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In the Supreme Court of the United States

OCTOBER TERM, 1976

SENATOR JOHN L. MCCLELLAN, ET AL., PETITIONERS

v.

ALAN MCSURELY AND MARGARET MCSURELY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of Senator John L. McClellan and his former aides, Jerome S. Alderman, Donald F. O'Donnell, and John Brick, petitions for a writ of certiorari to review the judgment of the court of appeals for the District of Columbia Circuit in this case.[1]

[1] Two petitioners died while the case was in the court of appeals, Brick on October 15, 1973, and Alderman on October 1, 1975. See App. A, *infra*, p. 4a n. 1. We have been advised that both Brick and Alderman left wills that were not probated, that their estates have no representatives, that all assets in the estates have been transferred to their surviving wives, and that respondents have not served the estates with process or sought to substitute the estates for Brick and Alderman. Under these circumstances the actions against Brick and Alderman appear to have abated. "[T]he law of the place of the wrong determines whether the claim for damages survives the death of the wrongdoer." *Ormsby* v. *Chase*, 290 U.S. 387, 388. Although we conceded in the court of appeals that the claims against Brick and Alderman technically survive their deaths, respondents have not suggested that any law of Kentucky or the District of Columbia would allow substitution or revival of the action at this late date.

Nevertheless, out of an abundance of caution, we have named Brick and Alderman as petitioners on the authority of Fed. R. App.

OPINIONS BELOW

The opinion of the court of appeals *en banc* (App. A, *infra*, pp. 1a-130a) is not yet reported. The opinion of the panel of the court of appeals (App. B, *infra*, pp. 131a-194a) is reported at 521 F.2d 1024. A prior opinion of the court of appeals (App. C, *infra*, pp. 195a-211a) is reported at 426 F.2d 664. The orders of the district court (Apps. E and F, *infra*, pp. 215a-217a) are not reported.

JURISDICTION

The judgment of the court of appeals *en banc* (App. D, *infra*, pp. 212a-214a) was entered on December 21, 1976. On March 15, 1977, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 20, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Speech or Debate Clause bars a private suit for damages against a Senator and his aides, alleging that some of their investigatory activities, in connection with a subject on which legislation may be had, were improper or unconstitutional.

2. Whether the court of appeals properly ruled on an allegation of dissemination of documents that was not presented to or decided by the district court.

P. 43(a), under which the appeal proceedings with respect to them were permitted to go forward notwithstanding their deaths and respondents' failure to request substitution. But cf. Rule 48(1) of the Rules of this Court.

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 6, clause 1 of the Constitution provides:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

STATEMENT

1. On August 11, 1967, a state judge in Kentucky issued a warrant authorizing a search of respondents' house for seditious literature (App. A, *infra*, p. 6a). State officials executed the warrant that evening and arrested respondents for criminal sedition, in violation of Ky. Rev. Stat. § 432.040 (1962) (*ibid.*).

On August 16, 1967, respondents sought a federal injunction against their prospective state prosecution; their complaint also requested the return of the seized materials. A three-judge district court was convened. By a divided vote the court declared the Kentucky sedition statute unconstitutional on its face as a violation of the First Amendment and enjoined the prosecution of respondents, who by then had been indicted. *McSurely* v. *Ratliff*, 282 F. Supp. 848 (E.D. Ky.). The court appointed Commonwealth's Attorney Thomas B. Ratliff custodian of the seized materials and directed

him to hold the materials in safekeeping until final disposition of any appeal (App. A, *infra*, pp. 6a-7a, 60a-61a). The "safekeeping" order was entered on September 14, 1967.[3]

2. At all times pertinent to this case, the Permanent Subcommittee on Investigations of the Committee on Government Operations of the United States Senate (the Subcommittee) was authorized by resolution of the Senate "[t]o make a full and complete study and investigation of violent disturbances of the peace [and] • • • civil and criminal disorder" (see App. B, *infra*, pp. 158a-159a and n. 66) with a view to ascertaining the nature and causes of such disturbances and recommending any appropriate legislation. In October 1967 a Subcommittee attorney discussed respondents' activities by telephone with Ratliff, and John Brick, an investigator for the Subcommittee, was dispatched to meet Ratliff (App. A, *infra*, p. 7a).[4]

Ratliff told Brick that the materials seized from respondents contained references to a meeting immediately preceding a riot in Nashville, Tennessee, and to organizations suspected of instigating riots. Brick was permitted to examine some of the seized materials.[4]

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[3] This order, and many of the other documents in the injunctive action in Kentucky, are reproduced as appendices to the jurisdictional statement in *McSurely* v. *Ratliff*, No. 1113, October Term, 1967.

[4] Between 1965 and 1968 a number of major civil disturbances took place in large cities, killing 189 persons and injuring 7,615 others. S. Rep. No. 91-137, 91st Cong., 1st Sess. 1 (1969). One of these riots occurred in Nashville, Tennessee, during April 1967, and the Subcommittee acquired information that appeared to link respondents to that disturbance (App. A, *infra*, p. 18a).

[4] Ratliff did not notify respondents of his action or seek formal permission of the three-judge court to act as he did. He later gave

He obtained copies of 234 of the documents and returned to Washington with these copies (App. A, *infra*, pp. 7a-8a). He did not take any originals.

On October 16, 1967, Senator John L. McClellan, the Chairman of the Subcommittee, signed subpoenas directing respondents, Ratliff, and the United States Marshal to produce documents in their possession pertinent to the meeting in Nashville preceding the riot there and pertinent to respondents' membership in or employment by several organizations (App. A, *infra*, p. 8a). Respondents requested the three-judge district court to prohibit Ratliff and the Marshal from complying with the subpoenas; respondents also requested return of the materials.[5] On October 30, 1967, the court denied these requests and directed all parties to the case "to cooperate with the Senate Committee in making available such of the materials, or copies thereof, as the Committee considers pertinent to its inquiry."[6] This Court stayed that order pending the district court's consideration of respondents' objections to the subpoenas. *McSurely* v. *Ratliff*, 389 U.S. 949.

On December 14, 1967, the three-judge district court rejected respondents' objections to the subpoenas and ordered Ratliff to allow persons on the Subcommittee staff to make photocopies of the documents.[7] On Janu-

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uncontradicted testimony, however, that before he allowed Brick to see the materials he spoke with one of the three judges of the court and received permission to grant access to Brick (App. A, *infra*, p. 63a).

[5] See pages 6a-9a of the jurisdictional statement in No. 1113, October Term, 1967.

[6] *Id.* at 4a.

[7] See pages 1a-3a of the jurisdictional statement in No. 1113, October Term, 1967.

ary 29, 1968, this Court stayed the order pending consideration of respondents' appeal (390 U.S. 914), which it dismissed on March 18, 1968, for want of jurisdiction (*McSurely* v. *Ratliff*, 390 U.S. 412).

Respondents then appealed the disclosure order to the court of appeals, which reversed. *McSurely* v. *Ratliff*, 398 F.2d 817 (C.A. 6). The court of appeals ordered the documents returned to respondents because (*id.* at 818) "[t]he business of the District Court in this case has been completed. The right of the Court to retain possession of the seized documents, which include no contraband, has expired." The court of appeals stated that its order was without prejudice to the right of the Subcommittee to enforce its subpoenas against respondents (*ibid.*).

3. Following this decision by the court of appeals, Brick returned to Kentucky officials the copies of the 234 documents that he had taken earlier (App. A, *infra*, p. 8a n. 13). Ratliff returned the orginial documents to respondents on November 8, 1968. The United States Marshal simultaneously served respondents with new subpoenas requiring them to testify before the Subcommittee and to bring certain documents with them (*id.* at 9a). Respondents appeared before the Subcommittee on March 4, 1969, but they refused to produce the requested materials (*ibid.*).

The Senate cited respondents for contempt of Congress. They were indicted and convicted of that offense after a jury trial in the United States District Court for the District of Columbia. The court of appeals reversed. *United States* v. *McSurely*, 473 F.2d 1178 (C.A.D.C.). The majority of the panel concluded

that the search warrant issued by the Kentucky judge in 1967 was based upon a conclusory affidavit that did not permit the judge to make an independent evaluation of probable cause, and that the search warrant was overly broad (*id.* at 1185-1190). The majority held that the subpoena should have been suppressed at trial as the "fruit of the poisonous tree." *Id.* at 1191-1194.[8] The court explicitly declined to consider respondents' argument that the seizures were improper because they had been carried out in aid of a statute later declared to be unconstitutional. *Id.* at 1190 n. 38.

4. On March 4, 1969, the same day they appeared before the Subcommittee, respondents filed the present suit. They sought money damages and an injunction against any potential criminal prosecution. The district court stayed the civil proceedings to allow the criminal trial for contempt of Congress to proceed; the court of appeals affirmed, although it remanded for further consideration of some collateral matters (App. C, *infra*, pp. 195a-211a).

In January 1971, while the court of appeals was considering the appeal from their convictions for contempt of Congress, respondents filed an amended complaint naming as defendants Ratliff and the four petitioners. They sought $50,000 damages from each petitioner. The complaint alleged, in essence, that petitioners conspired with Ratliff to: (1) carry out the illegal search and seizure of their documents in 1967;

[8] Judge Wilkey, concurring in the result, argued that congressional committees should be entitled to base subpoenas upon knowledge gained from unconstitutional seizures by state officials. 473 F.2d at 1194-1202. He concluded, however, that the materials eventually sought by the subpoena were not pertinent to the Subcommittee's inquiry (*id.* at 1203-1204).

(2) inspect and transport to Washington copies of 234 of those documents; (3) inspect those documents in Washington; (4) use the copies as the basis for issuing the subpoena; and (5) procure the citations for contempt of Congress.

Petitioners filed a motion for summary judgment, contending that the Speech or Debate Clause of the Constitution immunizes them from liability for the events described in the complaint. The district court held a hearing on this motion and, approximately 19 months later, denied it without explanation (App. E, *infra*, p. 215a). The court declined to certify the case for an interlocutory appeal pursuant to 28 U.S.C. 1292 (b) (App. F, *infra*, pp. 216a-217a). Ratliff did not move for summary judgment.

Petitioners appealed, and a divided panel of the court of appeals reversed, ordering the entry of summary judgment for petitioners (App. B, *infra*, pp. 131a-194a).*

* The panel held (App. B, *infra*, pp. 136a-142a) and the *en banc* court later unanimously agreed (App. A, *infra*, pp. 10a-11a n. 18) that the immediate appeal was appropriate under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541. The Speech or Debate Clause establishes a right not to be "questioned" in court for legislative activities, and part of that right would be irretrievably lost if petitioners were required to submit to discovery and undergo a trial. Cf. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156.

We have argued that the collateral order doctrine does not allow a pretrial appeal in criminal cases, even when the defendant seeks to vindicate a right not to be tried. See *Abney* v. *United States*, No. 75-6521, argued January 17, 1977. The special interest in the expeditious resolution of criminal cases (see *Cobbledick* v. *United States*, 309 U.S. 323, 324-326), however, makes it appropriate to have different rules of appealability in civil and criminal cases. We therefore believe that even though, under our argument in *Abney*, a claim of Speech or Debate Clause immunity could not be raised by pretrial appeal in a criminal case, it may be so raised in a civil case.

The court of appeals then heard the case *en banc*. In a brief *per curiam* order, the court unanimously instructed the district court to grant partial summary judgment for petitioners (App. A, *infra*, pp. 2a-3a). The court concluded that the Speech or Debate Clause gives petitioners absolute immunity from liability for any activities relating to the 1967 search of petitioners' house, the inspection or use by the Subcommittee of the 234 copies of documents, and the issuance of the subpoenas and the procurement of the citation for contempt of Congress (*id.* at 39a-43a, 54a).

An equally divided court affirmed the district court's order to the extent that it would subject petitioners to trial with respect to Brick's inspection of the documents and his transportation of the 234 copies to Washington (Apps. A and D, *infra*, pp. 3a, 213a). Judge Leventhal, writing for himself and Judges Bazelon, Wright, McGowan, and Robinson, concluded that *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, established a two-part test to determine whether judicial inquiry is barred by the Speech or Debate Clause. The first part of the test, Judge Leventhal stated, is whether the activity is related to the legislative process; the second is whether the legislative process has been conducted properly. Judge Leventhal concluded that Brick's activities "may fairly be deemed within [the Subcommittee's] province" and that the investigation concerned matters "on which 'legislation could be had'" (App. A, *infra*, p. 17a). Judge Leventhal thought, however, that Brick's con-

duct was unlawful (*id.* at 18a-39a, 46a-52a). Because, in Judge Leventhal's view, "employment of unlawful means to implement an otherwise proper legislative objective is simply not 'essential to legislating' " (*id.* at 20a), he concluded that Brick's conduct was not immune from further scrutiny.

Judge Leventhal explained that Brick's conduct violated the Fourth Amendment (App. A, *infra,* pp. 22a-32a) both because it violated the three-judge district court's "safekeeping" order and because the initial seizure of the documents was a violation of the Fourth Amendment.[10] Judge Leventhal also apparently concluded that Brick's actions were improper because some of the 234 documents that he received were not material to the Subcommittee's investigation (*id.* at 34a-39a).

Although Judge Leventhal's discussion concentrated on the propriety of Brick's activities, and although respondents "have made no factual proffer of 'involvement in any activity that could result in [the other petitioners'] liability' " (App. A, *infra,* p. 22a n. 43),

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[10] Although Judge Leventhal believed that the "safekeeping" order contained a requirement that Ratliff consult with the court before allowing copies of the documents to be made (App. A, *infra,* pp. 29a-30a, 48a, 50a), it contains no such command. Ratliff was ordered only to keep the original copies of the documents intact, and the three-judge court itself later ordered Ratliff to make them available to the Subcommittee's staff for copying. See pages 3-6, *supra.* Judge Leventhal also apparently believed that the three-judge district court had declared the 1967 search to have been unconstitutional (App. A, *infra,* p. 28a), but this, too, is incorrect. The three-judge court declared the statute unconstitutional and did not discuss the propriety of the search. *McSurely* v. *Ratliff, supra,* 282 F. Supp. at 851-854.

he nevertheless concluded that all four petitioners must undergo further proceedings in the district court that might lead to vicarious liability for Brick's deeds (*id.* at 44a-45a).

Moreover, while the case was pending in the court of appeals, respondents had learned that on occasion the Subcommittee's staff and staff of the Internal Revenue Service had access to each others' files (App. A, *infra,* pp. 13a-16a), and respondents suggested that some or all of the 234 documents might have been disseminated outside the Subcommittee, although they did not state that they had any information that this had occurred. Judge Leventhal wrote that further proceedings must be held in the district court concerning this claim of dissemination, and the court's judgment states that the district court's "judgment is affirmed, in part, * * * on the claim relating to alleged dissemination" (App. D, *infra,* p. 213a).

Judge Wilkey, writing for himself and Judges Danaher, Tamm, MacKinnon and Robb, argued that summary judgment should have been granted for petitioners (App. A, *infra,* pp. 54a-116a). Although Judge Wilkey accepted Judge Leventhal's interpretation of *Servicemen's Fund,* he disputed Judge Leventhal's conclusion that Brick had acted improperly. He argued that the three-judge district court allowed Brick's inspection of documents and that, although the 1967 search of respondents' house by state officers was unconstitutional, Brick's inspection of the fruits of that search was not a separate illegal act. Judge Wilkey

agreed that further proceedings should be held with respect to the claim of dissemination, but he suggested that in light of *Paul* v. *Davis*, 424 U.S. 693, respondents would be unable to establish any constitutional injury stemming from invasion of privacy (App. A, *infra*, pp. 54a, 101a-114a).

Judge Danaher, writing for himself and Judges Tamm, MacKinnon and Robb, argued that principles of official immunity require the dismissal of the complaint in its entirety, without respect to the scope of immunity under the Speech or Debate Clause (App. A, *infra*, pp. 117a-130a).[11]

REASONS FOR GRANTING THE PETITION

An equally divided court of appeals has required a Senator and one of his aides[12] to undergo further judicial proceedings for their vicarious involvement in activities related to the legislative process. It has done so because, in the view of five judges, the activities were improper, and because, in the view of all ten judges, the immunity of the Speech or Debate Clause dissolves when a private party presents evidence that " 'affords more than merely colorable substance' " (App. A, *infra*, p. 22a) to an assertion that activities related to the legislative process have been conducted improperly (*id.* at 18a-20a, 55a n. 3).

This holding would require a trial on the merits in

[11] Although the judges who joined this opinion also joined Judge Wilkey's opinion, the two opinions appear to call for different dispositions of the "dissemination" claim: Judge Wilkey would remand for further proceedings, and Judge Danaher would order the entry of summary judgment for petitioners.

[12] See note 1, *supra*.

many cases in which private persons claim to have been injured by legislators' actions. It would seriously erode the protection afforded by the Speech or Debate Clause and undermine the independence of Congress. Review of this case is particularly important because all of the active judges of the District of Columbia Circuit, where it may be anticipated that the majority of suits brought against Members of Congress would be filed, have concurred in the view that the scope of the Speech or Debate Clause immunity turns on a resolution of the merits of allegations of misconduct.

1. *a.* All ten judges of the court of appeals correctly concluded that Brick's investigation was a legitimate legislative inquiry into matters about which legislation could be had (App. A, *infra*, pp. 17a-18a, 55a n. 3). "[T]he power of inquiry is * * * an integral part of the legislative process," and it is part of the sphere of legitimate legislative activity within which both the Members of Congress and their aides may act free from judicial scrutiny. *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 501, 505.

The court's authority is at an end once it has determined that the conduct in question is related to a legitimate legislative function. A court is without power to determine whether the Members of Congress or their aides carried out their tasks properly. The court of appeals has held, however, that the Speech or Debate Clause immunity does not shield legislators from liability for improper legislative behavior by their aides. Under the court of appeals' approach, the district court must determine whether Brick erred; if he erred there is no immunity, but if he did not err petitioners

are immune. But an immunity that would protect only when no wrong has been committed is no immunity at all. Immunity is needed only when there has been misconduct of some sort,[13] and for that reason the Speech or Debate Clause appropriately has been construed as affording protection whether or not there has been impropriety. "Congressmen and their aides are immune from liability for their actions within the 'legislative sphere,' * * * even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes." *Doe* v. *McMillan*, 412 U.S. 306, 312-313.

Here, as in *Servicemen's Fund, supra*, 421 U.S. at 503, "a private civil action, whether for an injunction or damages, creates a distraction and forces Members [of Congress] to divert their time, energy, and attention from their legislative tasks to defend the litigation. * * * [J]udicial power is * * * brought to bear on Members of Congress and legislative independence is imperiled. [Consequently,] * * * once it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference."

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[13] As Judge Learned Hand explained in *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (C.A. 2), certiorari denied, 339 U.S. 949, with respect to official immunity, "[t]he decisions have, indeed, always imposed as a limitation upon the immunity that the official's acts must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine."

In *Servicemen's Fund* it made no difference whether the subpoena violated the First Amendment rights of the plaintiffs. So, here, it makes no difference whether Brick violated the Fourth Amendment. The scope of immunity does not turn upon whether respondents can make out a good case on the merits; it is irrelevant whether Brick erred, and the disagreement between Judge Leventhal and Judge Wilkey about the propriety of Brick's conduct therefore is beside the point. In inspecting respondents' documents held by Ratliff, and in transporting copies of some of them to Washington for further study, Brick was acting well within the legislative sphere. Accordingly, he, his associates on the Subcommittee staff, and Senator McClellan all were immune from liability arising out of those actions.

The contrary holding of the court of appeals apparently is based upon the belief that the Speech or Debate Clause should not be read to create immunity in the face of claims of unconstitutional action, else Members of Congress and their aides could violate the Constitution with impunity. In other words, the court made "the familiar argument that the broad protection granted by the Clause creates a potential for abuse. That is correct, and * * * we [have] noted that the risk of such abuse was 'the conscious choice of the Framers' buttressed and justified by history. * * * Our consistently broad construction of the Speech or Debate Clause rests on the belief that it must be so construed to provide the independence which is its central purpose." *Servicemen's Fund, supra*, 421 U.S. at 510-511. The court of appeals erred in holding that

proof that Brick had acted unlawfully would strip petitioners of their immunity.

b. The court of appeals' disposition of this case is inconsistent with *Dombrowski* v. *Eastland*, 387 U.S. 82. *Dombrowski* involved two separate claims, first that a Senator and his aide had taken possession of illegally seized materials after unconstitutional raids by state officers, and second that they had participated in planning the raids. This Court affirmed the lower court's holding that the first claim could not be maintained at all and held that under the Speech or Debate Clause the second claim could proceed only against the aide because "[t]he record [did] not contain evidence of [the Senator's] involvement in any activity that could result in liability" (*id.* at 84).

That is this case; after the State seized the materials, Brick obtained copies of some of them. Brick is immune under *Dombrowski* unless there was a separate impropriety in his acquisition of the documents, and even if there was such an impropriety Brick's acts could not be attributed to the other petitioners because, as the court of appeals acknowledged, "the record at present is silent on the involvement of defendants McClellan, Adlerman [*sic*] and O'Donnell" (App. A, *infra*, p. 45a; see also *id.* at 22a n. 43).[14] Cf. *Kilbourn* v.

[14] The court of appeals suggested that petitioners could make "a renewed motion for summary judgment" (App. A, *infra*, p. 45a) on the ground that respondents have not adduced facts demonstrating the involvement of persons other than Brick in any improprieties. But under *Dombrowski* petitioners' motion for summary judgment on Speech or Debate Clause grounds put in issue any question of involvement, and respondents then were required to show, if they could, that they would be able to prove involvement. Petitioners filed affidavits denying involvement, respondents did not introduce

Thompson, 103 U.S. 168 (an aide, but not Members of Congress, may be liable for an unconstitutional arrest carried out at the Members' direction).

c. Even if, as the court of appeals held, the question of immunity turns upon proof of wrongdoing, it seems clear that, as a matter of law, Brick committed no improprieties warranting imposition of civil liability. Respondents' argument that Brick violated their rights rests upon three considerations: (1) that Brick received copies of illegally seized documents, (2) that his receipt of those copies violated the judicial "safekeeping" order under which they were being held, and (3) that Brick transported to Washington copies of documents that proved to be immaterial to the legislative inquiry. None of those allegations, however, even if true, would form the basis for an award of damages.

(1) Wholly apart from the fact that Brick could not have known, in 1967, that in 1972 a court would determine that the documents had been improperly seized,[15] there is no impropriety in receiving, for use in congressional proceedings, the fruits of a State's violation of the Fourth Amendment. This follows directly from *United States* v. *Janis*, 428 U.S. 433, which held that evidence unconstitutionally seized by state officials could be used by federal officials in a civil tax case. *Janis* demonstrates that the use of documents illegally seized by another sovereign is not itself unlawful and does not constitute a separate impropriety. See also

affidavits tending to create a disputed issue of material fact on this question, and petitioners therefore were entitled to summary judgment without the necessity of further proceedings.

[15] See pages 6-7, *supra*. We have not discovered any other case in which a person has been required to answer in damages for inspecting documents that were improperly seized by third parties.

Burdeau v. *McDowell*, 256 U.S. 465 (official use of documents seized by private persons does not violate the Fourth Amendment). Cf. *United States* v. *Calandra*, 414 U.S. 338. If unconstitutionally seized documents may be used in civil tax cases, then surely they may be used in legislative proceedings. Congress should not be denied available information that may be highly pertinent to legislative decisions.

(2) Any violation of the 1967 "safekeeping" order is not attributable to Brick. Even if the 1967 order required Ratliff to obtain the district court's permission before allowing another person to copy the documents—a matter that evenly divided ten judges ten years later [16]—there has been no allegation that Brick knew or should have known that permission had not been obtained. There is no reason why Brick or the other petitioners should be called to account for any failure on the part of the custodian to comply with the "safekeeping" order.

(3) Liability on account of the selection and transportation of copies of irrelevant documents is inconsistent with *Servicemen's Fund*. "The very nature of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result." 421 U.S. at 509. Judge Leventhal's conclusion that the irrelevance of some documents to the legislative inquiry dissipates Speech or Debate Clause immunity would make legislative investigations quite risky, for investigators (and Members of Congress) could be

[16] Compare App. A, *infra*, pp. 22a-32a and 46a-52a with *id.* at 59a-80a. See also note 10, *supra*.

mulcted in damages whenever the investigation turned up papers that it was subsequently determined Congress did not need or want. Risk of that sort would hamper the legislative process. Once it has been determined—as it has been here—that the aide had a valid end in sight, it does not matter that hindsight could show that he erred in pursuing that end. "The wisdom of congressional approach or methodology is not open to judicial veto." *Ibid.*

2. The court of appeals purported to affirm the order of the district court insofar as that court had required further proceedings concerning the dissemination of the documents outside Congress (App. A, *infra*, pp. 13a-16a, 44a, 54a). There was no such order to affirm. Respondents' allegations of dissemination were made for the first time in the court of appeals; since the complaint did not make any allegations concerning dissemination, the district court had not entered any pertinent order. The court of appeals therefore lacked jurisdiction to proceed as it did, and this Court should vacate its judgment to relieve petitioners of any improper consequences of the court of appeals' judgment of "affirmance" and its remand to the district court for trial on the issue of improper dissemination."

Moreover, respondents have not alleged that there has been any dissemination to the public.[18] *Doe* v. *Mc-*

[17] If respondents desire to raise a claim of unlawful dissemination they should start afresh in the district court, provided that the pertinent statute of limitations permits litigation so long after the events in question.

[18] Even respondents' allegation of dissemination to the Internal Revenue Service is devoid of factual support. Brick returned all 234 copies to state officials on August 14, 1968, before the Subcom-

Millan, supra, 412 U.S. at 324-325, held that there is no absolute immunity for harm caused by improper dissemination of information to the public that is not justified by the legitimate legislative needs of Congress. But even if any cause of action for dissemination survives *Paul* v. *Davis,* 424 U.S. 693, there is no reason why Members of Congress and their aides should be exposed to damages on account of dissemination to a law enforcement agency of the government. Provision of information to law enforcement agencies should be encouraged, and it unquestionably is within the outer perimeter of legislative duties.[19]

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mittee and the Internal Revenue Service began to exchange any information (App. A, *infra,* pp. 8a n. 13, 9a n. 15, 14a n. 25).

[19] We believe that petitioners' immunity in this regard would stem from the Speech or Debate Clause and not, as Judge Danaher argued (App. A, *infra,* pp. 117a-130a), from general principles of official immunity. But if we are incorrect in this, then we submit that petitioners' official immunity is broad enough to protect them from liability on account of distribution within the government but outside the Legislative Branch. The question of the scope of official immunity for federal officials is before the Court in *Butz* v. *Economou,* No. 76-709, certiorari granted, February 22, 1977, which may shed some light on problems related to those presented in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL M. FRIEDMAN,
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BARBARA ALLEN BABCOCK,
Assistant Attorney General.

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ROBERT E. KOPP,
RAYMOND D. BATTOCCHI,
Attorneys.

MAY 1977.

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* The Solicitor General is disqualified in this case.

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1991

ALAN MCSURELY AND MARGARET MCSURELY

v.

JOHN J. MCCLELLAN, ET AL., APPELLANTS

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action 516-69)

(On Rehearing *En Banc*)

Argued en banc April 19, 1976

Decided December 21, 1976

Before: BAZELON, *Chief Judge*, DANAHER, *Senior Circuit Judge*, WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges*, sitting *en banc*.

Per Curiam: In August 1967, Kentucky officials, executing warrants issued under a state sedition statute, arrested plaintiffs (appellees) and seized books and papers from their home. Plaintiffs obtained a federal court ruling on September 14, 1967, declaring the state statute unconstitutional, enjoining prosecution, and ordering that the seized materials in the custody of the state prosecutor continue to be held by him in safekeeping until final disposition of the case. *See McSurely v. Ratliff*, 282 F. Supp. 848 (E.D.Ky. 1967).

This appeal involves the claim that the transportation and use of the seized materials subsequent to September 14, 1967, by the chairman of the Senate subcommittee and several members of the subcommittee staff (federal defendants) violated the constitutional and other rights of the McSurelys.

These federal defendants appeal from the District Court's denial of their motion, for dismissal or summary judgment, which they based on the immunity provided by the Speech or Debate clause of the Constitution, Art. I, § 6, cl. 1.

This court, en banc, enters these orders: (1) Reverses the District Court's failure to grant the motion of the

federal defendants to dismiss that part of the complaint relating to the original taking of the McSurelys' books and papers by the Kentucky authorities. (2) Reverses with directions to grant summary judgment to appellants on those parts of the complaint that complain of the alleged use made of the documents within Congress, since such use is protected by the Speech or Debate clause. (3) Affirms the District Court, with remand for further proceedings, on the claim as to alleged dissemination of some of the documents outside of Congress. (4) Affirms by an equally divided vote, the District Court's denial of summary judgment on the allegations concerning the action of subcommittee investigator Brick in inspecting the documents and transporting copies of some of them to Washington prior to issuance of a subcommittee subpoena.

The case is remanded for further proceedings not inconsistent with these opinions.

Opinions filed by: (a) Circuit Judge Leventhal—for a majority of the court en banc as to items (1), (2) and (3) above; and for himself and Chief Judge Bazelon, and Circuit Judges Wright, McGowan and Robinson, for affirmance as to item (4). (b) Circuit Judge Wilkey, for himself, Senior Circuit Judge Danaher, and Circuit Judges Tamm, MacKinnon and Robb, for reversal as to item (4). (c) Senior Circuit Judge Danaher, joined by Circuit Judges, Tamm, MacKinnon and Robb for dismissal of the complaint.

LEVENTHAL, *Circuit Judge*: This appeal is from a District Court order entered on June 12, 1973, in an action by Alan and Margaret McSurely against Honorable John L. McClellan, Jerome S. Adlerman, Donald F. O'Donnell, and John Brick, then the Chairman, General Counsel, Chief Counsel and Investigator, respectively of the Per-

manent Subcommittee on Investigation of the United States Senate Committee on Government Operations (hereinafter Subcommittee); and Thomas B. Ratliff, then Commonwealth Attorney for Pike County, Kentucky.[1] The plaintiffs, appellees here, seek compensatory and punitive damages from each defendant for alleged violations of their rights under 42 U.S.C. §§ 1981, 1983, and 1985, and under the First, Fourth, Fifth and Fourteenth Amendments of the Constitution.[2] These are claimed to arise from individual actions and a conspiracy of defendants to harass, stigmatize, and intimidate plaintiffs through the appropriation and use of materials taken from their home in an unlawful search by Kentucky agents on August 11, 1967. The District Court's order denied a motion of defendants McClellan, Adlerman, O'Donnell and Brick (hereinafter federal defendants) to dismiss or for summary judgment, and allowed the suit to proceed. Defendant Ratliff did not join the motion and is not a party to this appeal.[3]

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[1] During the pendency of this action, defendants Brick and Adlerman died. On December 4, 1974, this court, *sua sponte*, ordered the parties to file memoranda on whether a tort action against Brick or his personal representative survives that defendant's death. Both appellants and appellees responded that the action was maintainable against the personal representative of Brick's estate. Presumably the same would follow for defendant Adlerman. This matter should be addressed by the District Court on remand.

[2] Jurisdiction is founded on 28 U.S.C. §§ 1331, 1332, 1343(3) and (4).

[3] Defendant Ratliff is named in the amended complaint and filed an answer, *see* Appendix "A" to Br. for Appellees for the Court, Sitting En Banc. Since he did not file any motions in response to the issues raised in this action, there has been no pre-trial activity with respect to him. Plaintiffs maintain they have not discontinued the proceedings as to him. *Id.* at 17-18 n.7. The Government does not represent Ratliff and this appeal is not taken in his behalf. Br. for Appellants at 11 n.8.

The federal defendants argue in their appeal that further proceedings would violate their right under the Speech or Debate Clause of the Constitution[4] not to be questioned outside of Congress for their legislative acts, and that the use in a congressional investigation by defendant Senator and his aides of documents unlawfully seized by others was not barred by the Fourth Amendment.

A panel of this court in an opinion rendered October 28, 1975, one judge dissenting in part, reversed the District Court as to some of the claims in the complaint and remanded for further development "certain disputed issues which conceivably might show plaintiffs to have a cause of action."[5] By an order issued February 10, 1976, this court, *en banc*, granted appellees' suggestion for rehearing *en banc* and vacated the decision of the panel. Oral argument before the full court was held on April 19, 1976.

I. Background

The factual background of this case has been developed extensively in other decisions of this court.[6] To aid present consideration, we review briefly the facts perti-

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[4] The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House they shall not be questioned in any other place.

Art. I, § 6, cl. 1.

[5] McSurely v. McClellan, 172 U.S.App.D.C. 364, 369, 521 F.2d 1024, 1029 (1975).

[6] *See* McSurely v. McClellan, 138 U.S.App.D.C. 187, 189-90, 426 F.2d 664, 666-67 (1970); United States v. McSurely, 154 U.S.App.D.C. 141, 143-47, 473 F.2d 1178, 1180-84 (1972);

nent to this appeal, drawing generously on the outline of facts in the panel decision.[7]

In 1967 Alan and Margaret McSurely were organizers for the Southern Conference Educational Fund, Inc., in Pike County, Kentucky. Alan McSurely was also affiliated with the National Conference of New Politics and Vietnam Summer, both unincorporated associations. On the night of August 11, 1967, following issuance of an arrest warrant charging Alan McSurely with seditious activities against the Commonwealth of Kentucky in violation of KRS 432.040 and a search warrant calling for a seizure of seditious material, officials of Pike County arrested both the McSurelys and seized a large volume of books, posters, pamphlets and other materials found in their home.

On September 14, 1967, in response to a complaint filed by the McSurelys, a three-judge district court, for the Eastern District of Kentucky, found the Kentucky sedition statute facially unconstitutional, on grounds of First Amendment overbreadth and vagueness and federal preemption, and enjoined state prosecution of the McSurelys under the authority of *Dombrowski v. Pfister*, 380 U.S. 479 (1965).[8] In its order, the court directed Thomas B. Ratliff, Commonwealth Attorney for Pike County, to hold in safekeeping the seized materials,

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McSurely v. McClellan, *supra* note 5, 172 U.S.App.D.C. at 369-73, 521 F.2d at 1029-33.

[7] Reference will also be made throughout this opinion to the stipulations that were entered into, on December 5, 1967, between counsel for the McSurelys and the United States following the decision in McSurely v. Ratliff, 282 F. Supp. 848 (E.D.Ky. 1967) (hereinafter Stip.), App. 20-22; and to Defendants' Appendix in the related case, United States v. McSurely, 154 U.S.App.D.C. 141, 473 F.2d 1178 (1972) (hereinafter D.A.), which was filed as part of the record in this action on September 14, 1973.

[8] McSurely v. Ratliff, 282 F. Supp. 848 (E.D.Ky. 1967).

pending possible appeal of the court's decision to the Supreme Court.[9] Shortly thereafter, Lavern Duffy, Assistant Counsel to the Subcommittee, telephoned Ratliff to inquire about the seized items.[10] In a stipulation entered into after the three-judge court decision, counsel for the McSurelys and the United States agreed that "[t]he aforesaid telephone call represented the only contact" between Duffy and Ratliff.[11]

As a result of the Duffy call, on October 8, 1967, John Brick, an investigator for the Subcommittee, traveled to Pikeville. After Ratliff confirmed that the seized materials contained information relating to activities of organizations in which the Subcommittee was interested, Brick examined photocopies of 234 documents delivered to his Pikeville motel room by Thadeus Scott, a Commonwealth Detective. The following morning, October 9, Scott drove Brick to the Pike County Court House, where Scott's assistant, Herman Dotson, opened a locked door to the walk-in vault room in the Commonwealth Attorney's office which housed the originals of the seized materials. After examining these documents, Brick proceeded to the United States Post Office in Pikeville, where he inspected the file of three-judge court action, asking for

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[9] It is further ordered that all books, papers, documents and other material now in the custody of the Commonwealth Attorney of Pike County, Ratliff, reflected by the Inventory filed in this action continue to be held by him in safe keeping until final disposition of the case by appeal or otherwise.

D.A., II, 962.

[10] Apparently in response to queries from reporters, Ratliff had previously announced that the seized materials would be made available to congressional committees. *See* Answer of Thomas Ratliff, *supra* note 3, at 2A; Ratliff's testimony at the McSurelys' contempt trial, D.A., I, 399.

[11] Stip. 3, App. 20.

copies of the September 14 order and the inventory of seized items. On October 12, Brick returned to Pike County Court House, where, again accompanied by Scott and Dotson, he reexamined the seized materials for four hours and, according to a stipulation agreed to by the McSurelys' counsel, for the first time took notes of the contents of the documents.[12] Apparently, Brick was provided with copies of 234 of the documents, which he took with him on his return to Washington.[13]

On October 16, 1967, at Senator McClellan's direction, Brick prepared subpoenas duces tecum for certain of the McSurely materials in Ratliff's possession which the Senator had determined would be relevant to the Subcommittee investigation of the April, 1967 riot in Nashville, Tennessee. Plaintiffs filed motions with the three-judge court to prevent Ratliff from releasing the seized materials to the Subcommittee and to direct him to return the documents to them. Considerable litigation ensued, culminating in a decision by the Court of Appeals for the Sixth Circuit, on July 29, 1968, ordering the return of the materials because the time for appeal of the three-judge district court judgment had expired, but without prejudice to the right of the Subcommittee to

[12] Stip. 11, App. 21.

[13] Stipulation 9 states that on the morning of October 9, 1967, "Mr. Brick brought with him the xeroxed material which Mr. Scott had furnished to him the night before and returned it to Mr. Scott." App. 20-21. This appears to be an error, because Brick himself, in testimony at the McSurelys' contempt trial, stated that he took back to Washington the 234 photocopies that Scott had given to him on October 8, and these were returned to Scott on August 18, 1968, and received by the McSurelys on November 8, 1968. D.A., II, 728-30. Appellants concede this was the case, Br. for Appellants at 7. This court so found in our 1972 ruling, United States v. McSurely, *supra* note 7, 154 U.S.App.D.C. at 145-46, 154, 473 F.2d at 1182-83, 1191.

proceed with the enforcement of its subpoenas.[14] On November 8, the district court for Kentucky directed the return to the McSurelys of the seized items, and on the same day the McSurelys received the 234 copies that had been given to Brick.[15]

Upon receipt of these materials, the McSurelys were immediately served with new subpoenas similar to the original ones. The McSurelys appeared before the Subcommittee, on March 4, 1969, but refused to produce the subpoenaed materials. Pursuant to a Senate resolution, they were indicted for contempt of Congress on August 29, 1969. They were tried in the United States District Court for the District of Columbia. They were convicted on June 20, 1970. On appeal this court reversed the conviction, the majority taking the position that "the framing by the Subcommittee of the subpoenas relied upon here for conviction of the McSurelys was based upon information derived from unconstitutional searches, both by state officials and by the Subcommittee's investigator." United States v. McSurely, 154 U.S.App.D.C. 141, 155, 473 F.2d 1178, 1192 (1972).

The action for damages presently under consideration was originally filed in the District Court for the District of Columbia on March 4, 1969, the same day that the

[14] McSurely v. Ratliff, 398 F.2d 817 (6th Cir. 1968). See discussion in note 58 *infra*.

[15] There is some dispute as to when Brick returned the 234 copies. Defendants assert that Brick made the return to Commonwealth Detective Scott on August 14, 1968 for which he received a receipt, although the actual transfer to the McSurelys did not take place until November 8. D.A., II, 730. Plaintiffs counter that Brick retained possession until the November 8 transfer. To the extent this issue is relevant to the claims that survive our partial grant of summary judgment on the ground of legislative immunity, *see* note 25 *infra*, it is a matter for initial determination by the District Court on remand.

McSurelys appeared before the Subcommittee. The District Court issued an order staying all proceedings, to continue in effect until thirty days after final resolution of the criminal case against the McSurelys. On December 26, 1970, this court vacated the stay as overbroad, and remanded for further proceedings.[16] On August 30, 1971, plaintiffs were granted leave to file an amended and supplemental complaint. Shortly thereafter, the federal defendants filed a motion to dismiss or for summary judgment, which the District Court denied on June 12, 1973. During this period, the trial court reimposed a stay of discovery efforts by plaintiffs.[17] After the Supreme Court decided *Doe v. McMillan*, 412 U.S. 306 (1973), the federal defendants moved for reconsideration or certification under 28 U.S.C. § 1292(b) of the issue of their legislative immunity. The District Court denied this motion on July 9, 1973. This appeal followed.

II. The Issue on Appeal

The sole issue here is whether the federal defendants enjoy absolute immunity under the Speech or Debate Clause, both as a matter of substantive defense and as a bar to further judicial inquiry, for the conduct alleged in the amended complaint.[18] Following the ap-

[16] McSurely v. McClellan, 138 U.S.App.D.C. 187, 426 F.2d 664 (1970).

[17] After the District Court vacated the stay on June 12, 1973, plaintiffs proceeded to depose defendant O'Donnell on July 10 and Robert E. Dunne, a former employee of the Subcommittee, on August 3. No deposition has been taken from Senator McClellan, although he filed an affidavit denying plaintiffs' allegations, App. 56-61. Further discovery came to a halt after the federal defendants filed a notice of appeal on August 6, 1973.

[18] The District Court's denial of the motion to dismiss or for summary judgment based on a claim of legislative immunity is an appealable final order for purposes of 28 U.S.C. § 1291. On this point, we adopt the reasoning of the panel decision. McSurely v. McClellan, *supra* note 5, 172 U.S.App. D.C. at 370-72, 521 F.2d at 1030-32.

proach of the Supreme Court in *Doe v. McMillan*, 412 U.S. at 325, we decide here only the threshold question of legislative immunity, "indicat[ing] nothing as to whether [plaintiffs] have pleaded a good cause of action or whether [defendants] have other defenses, constitutional or otherwise."

The panel decision characterized the activities alleged in the amended complaint as falling into seven categories. All are asserted to have been engaged in by the federal defendants, in conspiracy with defendant Ratliff, for the purpose of harassing and intimidating plaintiffs and the organizations with which they may have been associated, driving plaintiffs out of Pike County, or carrying out a "personal vendetta" of defendant McClellan. The seven categories are as follows:

> (1) The unlawful search and seizure of the McSurelys' books and papers by Kentucky authorities.
>
> (2) The inspection by Brick of these unlawfully seized materials.
>
> (3) The transport by Brick of copies of 234 documents to Washington.
>
> (4) The inspection of some or all of these 234 copies by the staff of the Subcommittee.
>
> (5) The use of the copies as the basis for issuance of subpoenas for some of the documents.
>
> (6) The procurement of contempt of Congress citations against the plaintiffs by consciously withholding from the Senate the facts relating to the challenged subpoenas.

(7) The dissemination of some or all of the 234 copies obtained by Brick to persons or agencies outside of the Subcommittee—particularly the Internal Revenue Service.[19]

Appellants maintain that their conduct in this case is completely insulated from judicial scrutiny by the Speech or Debate Clause. We agree with the District Court that plaintiffs' action is not entirely foreclosed by legislative immunity. However, some of the allegations implicate legislative activity falling within the protective ambit of the Clause. To ensure that appellants are not put to the burden of defending themselves as to their protected legislative activity, we proceed to identify for the District Court's guidance on remand which of the allegations on the present record may be the subject of further proceedings, and which involve conduct entitling appellants to summary judgment in their favor.

III. Conduct Subject to Further Proceedings

Previous decisions of the Supreme Court make clear that the Speech or Debate Clause, designed to preserve the independence and integrity of the Legislative Branch, has been "read broadly to effectuate its purposes," *United States v. Johnson*, 383 U.S. 169, 180 (1966), including within its protective sweep those activities which are "generally done in a session of the House by one of its members in relation to the business before it," *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880). Accordingly, in addition to literal speech or debate within either House, the Court has recognized absolute immunity for legislators' acts of voting, conduct at committee hearings, preparation of committee reports, authorization of committee publications and their internal distribution,[20] and issuance of subpoenas concerning a subject "on which 'legislation could be had.'"[21] Aides are protected for conduct which would enjoy immunity if performed by the Members of Congress themselves.[22]

[19] McSurely v. McClellan, *supra* note 5, 172 U.S.App.D.C. at 373, 521 F.2d at 1033.

For a discussion of the claim based on dissemination to persons or agencies outside of Congress, see note 25 *infra*.

However, the Court has repeatedly insisted that the Speech or Debate Clause is subject to "finite limits,"[23] refusing to stretch its protective umbrella "beyond the legislative sphere" to conduct not "essential to legislating."[24] We now turn to those parts of the amended complaint that make allegations of conduct that may have breached those "finite limits," and are subject to further proceedings on remand.

A. *Dissemination Outside of Congress*

We discuss, first, the allegation of dissemination of some or all of the 234 documents to individuals or agencies outside of the Subcommittee. To the extent plaintiffs charge dissemination outside of the Halls of Congress, the federal defendants are not immune to further questioning.[25] "That Senators generally perform

[20] *See* Doe v. McMillan, 412 U.S. 306, 311-13, 317-18 (1973); Gravel v. United States, 408 U.S. 606, 615-16, 624, 628-29 (1972); Tenney v. Brandhove, 341 U.S. 367, 377-78 (1951).

[21] *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504-06 (1975).

[22] *See* Eastland v. United States Servicemen's Fund, 421 U.S. at 507; Doe v. McMillan, 412 U.S. at 317-18; Gravel v. United States, 408 U.S. at 620-22. *Compare* Dombrowski v. Eastland, 387 U.S. 82, 84-85 (1967) discussed in note 36 *infra*.

[23] Doe v. McMillan, 412 U.S. at 317.

[24] Gravel v. United States, 408 U.S. at 621, 624-25.

[25] The claim of dissemination of some or all of the 234 documents to the Internal Revenue Service (IRS) was not

certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." *Gravel v. United States*, 408 U.S. 606, 625 (1972). Even though Members of Congress or their

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made in the amended complaint. This claim arose because of the disclosure of certain IRS documents, obtained as a result of a Freedom of Information Act suit, which indicated contacts, beginning on August 28, 1968, between members of the Subcommittee staff and the IRS concerning formal access to each other's files.

On November 25, 1974, plaintiffs filed a supplemental affidavit lodging these recently disclosed materials with the court. The federal defendants countered on January 24, 1975, arguing that even if the IRS had gained access to the Subcommittee files at some point after August 28, 1968, the McSurelys could not have been harmed thereby because the 234 copies were returned to Commonwealth Detective Scott on August 14, 1968 (and received by the McSurelys on November 8, 1968), and Brick had testified at the McSurelys' contempt trial that he made no copies and that neither he nor the Subcommittee retained any of the documents, D.A., II, 730. Plaintiffs, in their reply to defendants' response, filed January 31, 1975, dispute both that the documents were turned over to Scott on August 14, 1968 and that no copies were made. Since we affirm the District Court's denial of summary judgment on this claim, we leave the resolution of this question to the District Court on remand.

Plaintiffs' amended complaint aiso alleges that Brick exhibited copies of the 234 items to unknown persons causing plaintiffs damage and embarrassment, and that McClellan "used the instrumentality of the [Subcommittee] investigation to carry out a personal vendetta between himself and a certain personage of prominence named in some of the private correspondence of the plaintiff Margaret McSurely." Amended and Suppl. Compl. ¶¶ 19, 28(b)(ii), App. 45, 50. However, there is no specific allegation that Brick embarrassed plaintiffs or that McClellan pursued his purported "vendetta" by dissemination outside of the Subcommittee itself. The claim of dissemination outside of the Halls of Congress apparently rests on access by IRS officials.

aides frequently intercede on behalf of constituents with agencies of the Executive Branch[26] or disseminate to the public beyond "the legitimate legislative needs of Congress" documents introduced at committee hearings,[27]

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[26] *See* United States v. Brewster, 408 U.S. 501, 512-14 (1972); United States v. Johnson, 383 U.S. 169, 172 (1966). As the Court stated in *Gravel v. United States*, "[m]embers of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies —they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity." 408 U.S. at 625.

[27] Although the Court has yet to deny legislative immunity to all public dissemination of materials developed in the course of congressional proceedings, it has held significant aspects of "the informing function of Congress," W. Wilson, Congressional Government 303 (1885), outside of the protection of the Speech or Debate Clause. In *Gravel v. United States*, the Court found that private republication of documents introduced and made public at a committee hearing "was in no way essential to the deliberations of the Senate," at least in the absence of authorization by Congress or the full committee. 408 U.S. at 625-26.

Doe v. McMillan goes a step further, at least three Justices holding that even congressional authorization does not serve to immunize publication and dissemination to the general public of "otherwise actionable materials going beyond the reasonable requirements of the legislative function." 412 U.S. at 314-16 & n. 10. The Court did not elaborate at what point general, public dissemination transcends "legitimate legislative needs," but apparently this turns on the extent of the publication and distribution. *Id.* at 324. In a separate concurrence, Justice Douglas, joined by Justices Brennan and Marshall, felt that the "informing function" was protected by the Speech or Debate Clause, but not where exposure to the public can be said to violate the First Amendment. *Id.* at 327-28. Even this view, however, denies "the absolute nature of the speech or debate protection" that has been afforded, say, issuance of subpoenas concerning a subject "on which 'legislation could be had.'" *See* Eastland v. United States Servicemen's Fund, 421 U.S. at 509 & note 77 *infra*.

such conduct falls outside of legislative immunity. It does not meet the test set forth in *Gravel*, that activities other than literal speech or debate are entitled to the immunity of the Speech or Debate Clause only when they are "an integral part of the deliberative or communicative processes by which Members participate in committee and House proceedings" with respect to matters before the House. 408 U.S. at 625. Similarly, distribution or exhibition of the 234 photocopies outside of legislative channels is not legislative activity entitled to absolute immunity by force of the Speech or Debate Clause, in the absence of a claim of legislative purpose.[28] Such activity, if otherwise actionable under the applicable law—a matter on which we express no opinion [29]—may be the subject of a private suit for damages.[30]

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[28] As previously indicated (see text at pp. 14-16 & notes 26-27 *supra*), there is a difference between actions taken by legislators, however frequently, and legislative activity protected by the immunity of the Speech or Debate Clause.

[29] The decision of the panel in this case stated that although dissemination to private individuals of unlawfully seized materials or to executive agencies of material which are known to have no reasonable relationship to the agencies' task might be actionable, "a Congressional committee lawfully may forward to appropriate Executive agencies information which it believes relates to their legitimate functions—particularly in a case, such as this, where the agency itself requested the information." McSurely v. McClellan, *supra* note 5, 172 U.S.App.D.C. at 387, 521 F.2d at 1047.

The issue before the court at this time is simply one of absolute legislative immunity. We leave open the question whether disseminaton of otherwise actionable material may be privileged on some other basis.

[30] We caution, however, that liability, if any, must be premised on acts of actual distribution or exhibition outside of the Halls of Congress, and plaintiffs must prove their case without reference to any legislative activity, such as acts of authorization. *See* Doe v. McMillan, 412 U.S. at 317-18; Gravel v. United States, 408 U.S. at 628-29.

B. *Inspection and Transportation of Documents Held in "Safekeeping" by Court Order*

The more difficult allegations relate to what may be termed investigative activity. We have no doubt that information gathering, whether by issuance of subpoenas or field work by a Senator or his staff, is essential to informed deliberation over proposed legislation. The recent decision in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 (1975), holds that "[t]he power to investigate and to do so through compulsory process plainly falls within" the test for legislative activity announced in *Gravel*. We think this principle must also extend to field investigations by a Senator or his staff. "A congressman cannot subpoena material unless he has enough threshold information to know where, to whom, or for what documents he should direct a subpoena. The acquisition of knowledge through informal sources is a necessary concomitant of legislative conduct and thus should be within the ambit of the privilege so that congressmen are able to discharge their constitutional duties properly." [31]

However, there are "finite limits" to the shield erected by the Speech or Debate Clause. Thus, *Servicemen's Fund* requires the court to determine whether the inquiry "'may fairly be deemed within [the Subcommittee's] province.'" 421 U.S. at 506. This requirement of congressional authorization of the inquiry by the particular subcommittee involved was clearly met in this case. In the broad, the investigative activity here concerned matters "on which 'legislation could be had.'" *Id.* at 506. The Senate Resolution of August 11, 1967, authorized an investigation into the causes of civil and criminal disorder that were racking the nation during

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[31] Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1154 (1973).

this period. And there was reason for investigative focus on the McSurelys. A riot had occurred on April 8-9, 1967, in Nashville, Tennessee. The McSurelys have stipulated that they attended a meeting of the Southern Conference Educational Fund in Nashville immediately before the April, 1967, riot.[32] Commonwealth Attorney Ratliff advised Brick in Pikeville on October 8 that some of the materials seized from the McSurleys' home contained reference to that meeting.[33]

This does not end our inquiry. Even though there is broad authorization for an investigation and justification for focus on particular individuals, a Member of Congress or congressional employee is not free to use every conceivable means to obtain investigatory materials, without fear of criminal prosecution or civil suit. The Court has taken "a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings." *Gravel v. United States*, 408 U.S. at 620. In *Gravel* the Court held the Senator and his aide immune from questioning with respect to conduct that transpired at a committee hearing, but refused to extend immunity to grand jury questioning concerning third-party crime or criminal conduct by the Senator or his aide related to preparation for the hearing.[34] Thus, the grand jury was

[32] Stip. 15, App. 21.

[33] Stip. 5, App. 20.

[34] An interesting parallel to the *Gravel* case can be found in the Duncan Sandys incident. In 1938, Sandys, an opposition member of the House of Commons, obtained and disclosed secret military documents, allegedly in violation of the Official Secrets Act, 10 & 11 Geo. 5, c. 75 (1920). Sandys sought to arouse public sentiment to remedy inadequate anti-aircraft defenses around London, a problem disclosed by the documents. A military court of inquiry subpoenaed Sandys to determine the source of the documents. This led to the appointment of a special committee of Commons, which determined that the solicitation or receipt of information in contravention of the Official Secrets Act was not privileged activity. Report for the Select Committee on the Official Secrets Act xi (London, 1939).

permitted to "trac[e] the source of obviously highly classified documents that came into the Senator's possession," provided "no legislative act is implicated by the questions," *id.* at 628, notwithstanding the fact that those documents were an integral part of the preparation for the committee proceeding that was held protected conduct.[35] *Dombrowski v. Eastland*, 387 U.S. 82 (1967), holds that the Speech or Debate Clause will not protect a Member or employee of Congress from suit if he engages in a conspiracy with state officials to obtain information by unlawful search and seizure in violation of the Fourth Amendment.[36]

[35] *See* Gravel v. United States, 408 U.S. at 629-33 (Stewart, J., dissenting in part); Reinstein & Silverglate, *supra* note 31, at 1155-56.

[36] In Dombrowski v. Eastland, the Speech or Debate Clause protected Senator Eastland, who was also a subcommittee chairman, but not subcommittee counsel Sourwine. The Court dismissed the complaint as to Eastland because "the record [did] not contain evidence of his involvement in any activity that could result in liability," but permitted trial to continue as to Sourwine because "[t]here [was] controverted evidence in the record . . . which afford[ed] more than merely colorable substance" to the yet unproved charge that he conspired to violate the constitutional rights of private parties. 387 U.S. at 84-85.

The case stands for the proposition that both a Member of Congress and his aides are equally answerable to a charge of conspiracy to violate Fourth Amendment rights, provided petitioners set forth specific facts showing a genuine issue for trial. *See* Note, *The Scope of Immunity for Legislators and Their Employees*, 77 YALE L. J. 366, 381-82 (1967). Not-

The employment of unlawful means to implement an otherwise proper legislative objective is simply not "essential to legislating." As with taking a bribe, resort to criminal or unconstitutional methods of investigative inquiry is "no part of the legislative process or function; it is not a legislative act." *United States v. Brewster*, 408 U.S. 501, 526 (1972). While "protecting the rights of others" in such cases "may have to some extent frustrated a planned or completed legislative act," the focus on means permits the court to afford relief "without proof of a legislative act." *Gravel v. United States*, 208 U.S. at 621.[37]

As to the matter of conspiracy in the initial raid of the McSurelys' home by Kentucky authorities, the amended complaint alleges Ratliff's involvement,[38] but it does not appear to charge any of the federal defendants with promotion of or participation in the original search and seizure. The amended complaint merely asserts that "[a]t or about the time of the initial unconstitutional and illegal raids" the federal defendants, and unknown others, "undertook a plan of action to [c]ontinue the course

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withstanding some language in the opinion, *see* 387 U.S. at 85, subsequent decisions of the Court make clear that the immunity available is defined by the nature of the act involved, not the status of the actor. *See* Gravel v. United States, 408 U.S. at 620-22; Doe v. McMillan, 412 U.S. at 315, 317-18; Eastland v. United States Servicemen's Fund, 421 U.S. at 507.

[37] *See also* United States v. Dowdy, 479 F.2d 213, 224 n.20 (4th Cir.), *cert. denied*, 414 U.S. 823 (1973).

[38] Amended and Suppl. Compl. ¶¶ 11-14, App. 41-43. Since Ratliff is not a party to this appeal, we have no occasion to decide whether a state prosecutor enjoys absolute immunity in a 42 U.S.C. § 1983 suit for actions undertaken in an investigative capacity, a question left open in the Supreme Court's recent decision in Imbler v. Pachtman, 424 U.S. 409, 430-31 & n.32 (1976).

of action undertaken by defendant Ratliff . . . ." [39] Although there is a certain tolerance in the federal system of lapses in pleading and curative amendments, at this late stage of an action which was originally filed on March 4, 1969, we must hold plaintiffs to their failure specifically to allege that any of the federal defendants promoted or participated in the Kentucky raid.[40] Appellants are entitled to dismissal at this juncture of any claim that they participated in the initial unlawful seizure by the Kentucky officials.

The amended complaint clearly charges a conspiracy of the federal defendants, in concert with Ratliff, to inspect, obtain copies of, and transport back to Washington private and personal correspondence among the seized materials "notwithstanding the [safekeeping] order of the United States District Court," and "without knowledge of the plaintiffs. . . ." [41] Although plaintiffs have not sharply articulated their theory of liability, their allegations are unmistakably addressed to a wrongful inspection and transportation of documents (causing constitutional injury) which were independent of the

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[39] Amended and Suppl. Compl. ¶ 18, App. 43-44.

[40] We note that the McSurelys had stipulated in an earlier case that Subcommittee assistant counsel Duffy did not have any contact with Ratliff until their September, 1967 telephone call, more than a month after the raid, Stip. 2-3, App. 20; and there is no evidence in the record at present that Brick, or any other individual associated with the Subcommittee, traveled to Kentucky until October 8, almost two months after the raid.

If in the course of discovery on the claims that survive the legislative immunity bar evidence develops as to the complicity of the federal defendants in the original raid, plaintiffs may seek to amend their complaint, subject to the requirements of Fed.R.Civ.P. 15.

[41] Amended and Suppl. Compl. ¶ 19, App. 45.

initial raid by Kentucky officials.[42] Without deciding whether Brick, and the others allegedly acting in concert with him, did indeed violate the Fourth Amendment by his inspection and transportation back to Washington of documents that were under a court-imposed "safekeeping" order, and, if so, whether other defenses are available to escape or mitigate liability in damages, there is evidence in the record as it presently stands "which affords more than merely colorable substance" to the claim of an independent Fourth Amendment violation by Brick.[43]

We note that the prior decision of this court reversing the McSurelys' conviction for contempt of Congress was premised on the fact that Brick committed an independent Fourth Amendment violation by his unauthorized inspection and transportation back to Washington of the 234 documents.[44] Although our prior decision is not res

[42] The focus here is on the illegality committed by the federal defendants, for it is *their* employment of means in violation of the Fourth Amendment, if any, that would bring this case within *Gravel v. United States* and *Dombrowski v. Eastland*.

[43] As is explained in part V *infra*, we do not at this juncture pass on whether the Fourth Amendment claim should be dismissed as to defendants McClellan, Adlerman and O'Donnell, even though plaintiffs have made no factual proffer of "involvement in any activity that could result in [their] liability." Dombrowski v. Eastland, 387 U.S. at 84.

[44] "[T]he thrust of" the McSurelys' appeal in that case was "upon the basic constitutional issue of unlawful search and seizure, not only by the Kentucky officials, *but later by a United States Senate Subcommittee*. It is their position that their refusal to comply with the Subcommittee subpoenas cannot support contempt convictions when the subpoenas themselves were based on *an unauthorized inspection by the Subcommittee investigator* of documents which had been seized by state officials in Kentucky in violation of the Fourth Amendment and under an unconstitutional statute." United

States v. McSurely, *supra* note 7, 154 U.S.App.D.C. at 144, 473 F.2d at 1181 (emphasis supplied). Throughout the opinion the court makes clear that the conviction must be reversed because the subpoenas "were the product of the unauthorized inspection and search of the documents by an agent of the Subcommittee itself"—the product of an independent Fourth Amendment violation by the Subcommittee through the actions of its investigators. *See id.* at 145-46 & n.8, 147, 154-55, 157, 473 F.2d at 1182-83 & n.8, 1184, 1191-92, 1194.

This was not a case of mere "derivative use" by the Subcommittee of the "forbidden fruits" of the initial illegality of Kentucky authorities. In addition to Weeks v. United States, 232 U.S. 383 (1914), which established the exclusionary rule for federal prosecutions, the McSurelys relied on Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). *See* 154 U.S.App.D.C. at 147, 473 F.2d at 1184. In *Silverthorne* the Court struck down a contempt conviction for refusal to comply with a grand jury subpoena for originals of documents that had been previously unlawfully seized by the Government and ordered returned by a district court. As Justice Holmes noted, "the case is not that of knowledge acquired through the wrongful act of a stranger, but it must be assumed that the Government planned or at all events ratified the whole performance." 251 U.S. at 391. *Silverthorne* did not involve "knowledge of [facts] gained from an independent source [which] may be proved like any others, but [rather] knowledge gained by the government's own wrong [which] cannot be used by it in the way proposed." *Id.* at 392.

Judge Wilkey, concurring in the 1972 reversal of the McSurelys' conviction, explained that "Justice Holmes properly refused to allow a subsequent regular subpoena to remove the taint on evidence which had been discovered in a previous illegal search," because "[t]he knowledge obtained from the illegal search would have made the subsequent documents in effect their own fruit." 154 U.S.App.D.C. at 159 & n.3, 473 F.2d at 1196 & n.3. Moving to the case before him, Judge Wilkey noted that "some degree of *active* participation by the Subcommittee's investigator in a violation of the McSurelys' Fourth Amendment rights, if that violation was also the sole source of the information upon which the subpoenas were issued, might justify refusal to enforce the subpoenas." *Id.* at 164, 473 F.2d at 1201. However, Judge Wilkey decided to reverse the conviction on "[t]he sounder ground" of lack

judicata as to appellants who were not parties to the criminal proceeding, the findings and conclusions stated therein are surely pertinent to the determination of whether plaintiffs have made enough of a proffer of unconstitutional investigative activity to survive a motion for summary judgment grounded on legislative immunity. In unmistakable terms, this court rejected the contention that Brick's conduct was merely passive receipt of materials from one who had lawful custody and authority to grant access to a legislative investigator. We stated:

> That activity might more appropriately be described (1) as an unconstitutional exercise of power by the Commonwealth attorney, Ratliff, and his subordinates at a time when Ratliff had no right whatever in and to these papers except to hold them in safekeeping (pending appeal) pursuant to the order of the three-judge court; and (2) as an unlawful encroachment by the Subcommittee investigator himself upon the rights of the McSurelys under the Fourth Amendment. Not only was the search and seizure of appellants' property by the Commonwealth officials illegal, but the subsequent search and use of that property by the Subcommittee investigator, with the cooperation of the Commonwealth attorney, violated appellants' constitutional right to have their property safe and secure from unwarranted inspections.

United States v. McSurely, 154 U.S.App.D.C. at 155, 473 F.2d at 1192.[45]

This case is shaped by appellants' position in the pleadings. It does not involve, nor require probing what legal

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of pertinency of some of the subpoenaed material "to the valid subject of the legislative inquiry." *Id.* at 166, 473 F.2d at 1203.

[45] *See also* 154 U.S.App.D.C. at 154, 473 F.2d at 1191.

consequences would be appropriate for, an instance of a truly passive receipt by Subcommittee personnel. This is not a case where appellants had nothing more to do with the seized documents than to be in the office at a time when, without prearrangement, Ratliff spontaneously either deposited the documents on Brick's desk in the Subcommittee office in Washington or disclosed their contents to the public at large.[46] The pleadings before us are entirely congruent with the situation as presented in the stipulations of counsel for the McSurelys and the United States in an earlier case and Ratliff's testimony at the contempt trial, that the inquiry was initiated by the Subcommittee, and that Brick took active steps to obtain access to the seized materials and cart back from Kentucky to Washington copies of the McSurelys' documents, including two separate visits to the walk-in vault room where the originals were stored.[47] Appellants'

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[46] Judge Wilkey's concurring opinion in United States v. McSurely notes that "although Brick's examination of the McSurelys' documents may be characterized as an illegal subcommittee action," there are serious line-drawing problems in determining when active conduct ends and "passive reception of illegality seized information from others" begins. 154 U.S.App.D.C. at 165, 473 F.2d at 1202. The line to be drawn in the case before us is fairly clear. As Justice Holmes has pointed out, even the broadest, least controversial standard may well be arbitrary at the margin, yet that is no reason for refusing to recognize differences of degree and thereby giving no weight to important privacy interests. *Cf.* Haddock v. Haddock, 201 U.S. 562, 631-32 (1906) (Holmes, J., dissenting).

[47] *See* Stip. 1-11, App. 20-21. Ratliff testified at the McSurelys' contempt trial that he never contacted a Member of Congress or his staff ("I was contacted, but I did not contact"). He also stated that at first he refused Brick access to the seized materials, because he had refused "other people who had wanted to see this and who were curious to see this material," but "after [Brick] assured me—what his purpose was, he was permitted to view it." D.A., I, 401-03.

counsel contend that Brick "played no role in the selection of the documents he would be given." [48] Brick's own testimony at the contempt trial indicates that his activities included some discretion in selection of what he examined and re-examined.[49] Moreover it cannot rightly be put that there is no claim within the cognizance of the Fourth Amendment because of the cooperation of the custodian. Cooperation of a custodian without authority to grant access may obviate use of force, but it does not validate an otherwise unlawful search and seizure.[50]

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[48] Reply Br. for Appellants at 5.

[49] Brick testified on direct that he did not "play any part at all in the selection" of the documents that Commonwealth Detective Scott delivered to him in Brick's Pikeville motel room on October 8, 1967. D.A., II, 728. But he then went on to explain that the following morning he went to the Pike County Court House to examine the originals of the seized items, segregating out records that were of absolutely no interest to him. "I wouldn't want to say [I examined] all [of the documents]. I would say almost all. I may have missed some of them. I did not inspect the records of a man named Joseph Malloy. They were mixed in with these. I had no interest in those." *Id.* at 729. *See also id.* at 738-39 (on cross-examination).

On cross-examination Brick stated that when the documents were handed to him he examined what he was receiving; that he told Assistant Commonwealth Attorney Dotson and his assistant, Scott, that he did not think he needed some of the documents, but did not return the items he did not need; and that "[t]here were many others in the locked vault in the Court House" that he did not take but "would have obtained under the [first] subpoena had not the Subcommittee stopped all action when the defendants went into Court." D.A., II, 734-36.

[50] "[S]earches without a warrant or probable cause may be made upon the voluntary consent of the party affected or of someone authorized *by that party to control* access to the places or things searched." Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 358 (1974)

The scope of Ratliff's actual authortiy as court-designated custodian to hold in "safekeeping" the seized materials remains an issue. While in the absence of the "refinement which can occur only as a result of trial" [51] we can not make a conclusive determination, we can state with fair certainty that plaintiffs have made out

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(emphasis supplied). As to third-party consent, "when the consenting party has less than a complete proprietary or possessory interest in the searched premises, the implicated party is usually not bound by the consent." Comment, *Third Party Consent to Search and Seizure*, 33 U.CHI. L. REV. 797, 805 (1966). *See, e.g.*, Stoner v. California, 376 U.S. 483, 488-90 (1964) (hotel clerk's apparent authority to consent to search of guest's room held inadequate to validate search); Chapman v. United States, 365 U.S. 610, 616-17 (1961) (landlord's consent held inadequate even though he had not only apparent authority but actual authority for some purposes to enter leased premises, *e.g.*, "to view waste"). *See also* United States v. McSurely, *supra* note 5, 154 U.S.App. D.C. at 164 n.23, 473 F.2d at 1201 n.23 (Wilkey, J., concurring).

In connection with a disposition on the merits, there may be available to Brick a qualified defense to the damages action (not an absolute immunity from suit) of "good faith and reasonable belief in the validity of the search"—a matter on which we express no opinion. *See, e.g.*, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 456 F.2d 1339, 1348 (2d Cir. 1972). We cannot anticipate what might be involved if such a defense is proferred. We are aware of fragments of Brick's position as presented at the McSurelys' contempt trial—that he believed in good faith that Ratliff had authority to show him the documents, D.A., II, 728, and learned of the court's "safekeeping" order when he examined the court's file on October 9, 1967, his last day in Pikeville on the first visit, *id.* at 737-38. Assuming good faith in his first inspection, other issues would remain—concerning his second visit; and his transporting the documents with awareness of the court's "safekeeping" order, without the court's permission, McSurelys' consent, or arrangement for a committee subpoena.

[51] Dombrowski v. Eastland, 387 U.S. at 84.

a prima facie case to the effect that the purpose of the "safekeeping" order of the three-judge court was to preserve the seized items both for the McSurelys' benefit and for the orderly administration of the judicial process through "appeal or otherwise," and that Brick's investigative activity outside of the channels established by the court violated its order.

The three-judge court had found unconstitutional on grounds of First Amendment overbreadth and vagueness and, alternatively, federal preemption the Kentucky sedition statute under which the original raid was made. The court also enjoined further state prosecutions under the statute, largely because it discerned a concerted effort by state and county officials to "freeze" the McSurelys and their associates out of Pike County.[52] With the statutory predicate declared unconstitutional, there was no legal justification for the intrusion into the McSurelys' home or for the seizure of their papers, and certainly none for the retention of those papers. The court did not return the seized materials to their owners because it sought to preserve the existence of the res in the event of appeal to, and reversal by, the Supreme Court. Toward this end, the court made Ratliff, then the

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[52] [T]he conclusion is inescapable that the criminal prosecutions were instituted, at least in part, in order to stop plaintiffs' organizing activities in Pike County. That effort has been successful. Not only has there been the "chilling effect" on freedom of speech referred to in *Dombrowski* [*v. Pfister*, 380 U.S. 479 (1965)], there has been in fact a freezing effect. The Governor has issued a public statement that federal funds to the Appalachian Volunteers should be discontinued. Plaintiff's possessions have been seized and impounded and they have been placed in jail. . . . Clearly, the criminal prosecutions have put a damper on plaintiffs' freedom of speech, as well as on others who might be in sympathy with their objectives.

McSurely v. Ratliff, *supra* note 8, 282 F. Supp. at 852-53.

state's chief attorney for the county, custodian over the documents for a limited purpose, but it did not empower him to act without further permission to make these materials available to anyone of his choosing.[53] Ratliff was apparently of this view at first, for he testified at the McSurelys' contempt trial that he tried to obtain the court's permission before granting Brick access to the documents. Without obtaining the court's permission,[54] or seeking the consent of the McSurelys or their lawyer, or even advising his co-custodian, the United

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[53] The court, on September 11, 1967, upon the motion of the McSurelys' counsel that the seized materials be impounded and that defendant Ratliff safeguard such material, and pursuant to the agreement of the parties, directed (1) that the materials be kept in the custody of Ratliff and the United States Marshal for the district, Archie Kraft, and that the co-custodians make an inventory of the documents; and (2) that Ratliff return to the McSurelys "such personal articles and property as he does not deem material to the investigation and prosecution herein." Three days later, on finding KRS 432.040 facially unconstitutional and enjoining state prosecution of the McSurelys, the court issued its "safekeeping" directive. This satisfied in part the request of McSurelys' counsel, and was responsive to the McSurelys' privacy interests, modified only to obviate mootness.

[54] Ratliff testified that he "was admonished" by the court "to keep the materials [in the walk-in vault room of the Commonwealth Attorney's office in the County Court House] and agreed to do so," D.A., I, 404; and that before granting Brick access to the materials he made "strenuous efforts to contact one or all of the three judges," and although he could not find Judges Combs and Gordon he "did talk to Judge Monahan," *id.* at 406. Although later on in the testimony Ratliff stated in oblique fashion "I had my permission," *id.* at 407, this court in United States v. McSurely, *supra* note 7, 154 U.S.App.D.C. at 165 n.8, 473 F.2d at 1183 n.8, found that he merely "contacted the third" judge, and "there is no evidence that Ratliff received any formal permission in the form of a court order authorizing inspection of the McSurelys' seized property by the Subcommittee investigator."

States Marshal,[55] Ratliff acceded to Brick's request for access.

The seriousness of the situation is not mitigated by the possibility that the three-judge court might have deemed it appropriate to honor a request from Ratliff or the Subcommittee to permit Brick to examine pertinent papers. Indeed, that only accentuates the gravity of the situation. Instead of acting lawlessly, the Subcommittee investigator should have used proper process which, in turn, would have permitted the court, if it granted the request, or the McSurelys, if their permission had been sought, to safeguard against encroachment beyond the legitimate legislative sphere, into personal and private papers that lacked even arguable relevance to the legislative inquiry.[56]

Nor do we think that events occurring subsequent to Brick's actions in Pikeville on October 8-9 and 12, 1967, rebut plaintiffs' present showing that Brick committed an independent Fourth Amendment violation. If Brick's prior search-and-taking was unlawful, it could not be sanitized by the subsequent issuance by the Subcommittee of subpoenas duces tecum.[57] Nor can its validity be established by the subsequent orders of the three-judge court, issued while its September 14, 1967, order was still subject to appeal and review, refusing to direct Ratliff to return to the McSurelys the seized documents called for by the Subcommittee subpoena.[58] The issue

[55] Ratliff acknowledged that he did not seek the approval of the McSurelys, their counsel, or United States Marshal Kraft, co-custodian for the seized materials. D.A., I, 408.

[56] *See* discussion in section III C, *infra*.

[57] *See, e.g.*, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), discussed in note 44 *supra*.

[58] These orders issued on October 30 and December 13, 1967. Following the Supreme Court's dismissal of the McSurelys' appeal for want of jurisdiction, the Court of Appeals

before the court was whether the McSurelys had a right to bar access to documents sought by a facially proper subpoena duces tecum. Apparently, and appellants do not contend otherwise, this matter was decided without regard to Brick's pre-subpoena activities.[59] The court's decision to honor proper process issuing from the Subcommittee was not intended as, nor did it constitute,

for the Sixth Circuit ordered the return of the seized materials because the time to appeal the three-judge court's September 14, 1967 ruling had expired. The latter refused "to render an advisory opinion" on the McSurelys' objections "concerning the validity and interpretation of the Senate Resolution and the breadth of the investigation authorized thereby," and simply reversed the district court "without prejudice to the right of the Senate Committee to proceed with the enforcement" of its subpoenas. McSurely v. Ratliff, 398 F.2d 817, 818 (6th Cir. 1968).

[59] Appellants contend in their opening brief "that at every significant stage of this case the conduct of the federal defendants has been sanctioned by the courts." Br. for Appellants at 32. They retreat somewhat from this position in their reply brief, suggesting that if the three-judge court and the Sixth Circuit failed to pass on Brick's prior search and seizure this was due to plaintiffs' failure to bring the matter to the courts' attention. Reply Br. for Appellants at 10 n.9.

The McSurelys testified at their contempt trial that they first learned of Brick's inspection and possession of 234 copies of their documents on December 5, 1967, and were not sure which documents, in particular, were made available to Brick until the 234 photocopies were returned on November 8, 1968. D.A., II, 655-56, 681-82, 704-05, 707-09. Appellees assert that "[t]he record before the Sixth Circuit included none of the facts which subsequently emerged as to what was done with Mrs. McSurely's personal correspondence." Br. for Appellees at 23.

The parties have not filed with this court copies of the record that was before the three-judge court and the Sixth Circuit. Thus we do not know whether the McSurelys' objections to the Subcommittee subpoena made reference to Brick's prior conduct. This is a matter that would benefit from further ventilation on remand.

approval of the prior search and seizure of Brick, pursued in a surreptitious manner and without resort to the procedures of the very court which had intervened and asserted control over the seized materials.

The Calandra Doctrine

Appellants contend throughout that, in addition to the bar raised by the Speech or Debate Clause, the Supreme Court's decision in *United States v. Calandra*, 414 U.S. 338 (1974), saves them from any liability on Fourth Amendment grounds for Brick's conduct. The theory seems to be that if the mere use of information by a grand jury obtained from a prior unlawful search and seizure does not state an independent Fourth Amendment violation, neither does the mere use by Brick and the Subcommittee of the fruits of prior unlawful conduct by the Kentucky authorities.

Without determining whether *Calandra* applies with full force to the legislative context,[60] we find maintenance of the present action wholly congruent with *Calandra*. In *Calandra* the government agent had taken custody and authorized delivery of the seized materials to the grand jury before there was any judicial determination of illegality and ruling restricting access to the materials.[61]

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[60] The opposing considerations are identified in the opinions of the panel of this court. *Compare* McSurely v. McClellan, *supra* note 5, 172 U.S.App.D.C. at 385-86, 521 F.2d at 1045-46, *with* 172 U.S.App.D.C. at 392-93, 521 F.2d at 1052-53 (Leventhal, J., concurring in part and dissenting in part).

[61] Although *Calandra* holds the exclusionary rule generally inapplicable to grand jury inquiry, the Court was careful to preserve intact the holding of Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). Justice Powell, for the Court, noted that *Silverthorne* was distinguishable in part because "prior to the issuance of the grand jury subpoenas, there had been a judicial determination that the search and seizure were illegal." 414 U.S. at 352 n.8. That a judicial

Here prior to Subcommittee access a court had intervened and declared the state search and seizure without legal justification because the operative statute was unconstitutional. Through the "safekeeping" directive the court asserted control over the seized documents, and did not authorize delivery to the Subcommittee. In Fourth Amendment terms, *Calandra* involved a single search and seizure by federal agents and mere "derivative use" by the grand jury, whereas two separate, independent searches and seizures took place here. When *Calandra* refused to apply the exclusionary rule, it noted the availability of an action for damages for the unlawful taking by government agents.[62] To raise *Calandra* as a bar to this action is to extend that decision beyond its rationale and express limitations, to the effect that there is no action for any constitutional wrong by federal defendants, with the McSurelys "necessarily left remediless in

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determination of illegality preceded issuance of the subpoenas in *Silverthorne* rendered inapplicable a major concern of the Court: the fear that allowance of pre-indictment suppression hearings would hopelessly disrupt the orderly progress of grand jury investigations. *Id.* at 349-50. Thus, even assuming *arguendo* that *Calandra* applies with full force to legislative inquiry, our 1972 ruling in United States v. McSurely remains good law. As we develop in note 44 *supra*, this court's 1972 decision rested, by analogy to *Silverthorne*, on the independent illegality committed by an investigator's circumvention of judicial control over seized documents after a ruling that the initial seizure was made without legal justification.

[62] It should be noted that, even absent the exclusionary rule, a grand jury witness may have other remedies to redress the injury to his privacy and to prevent a further invasion in the future. He may be entitled to maintain a cause of action for damages against the officers who conducted the unlawful search. . . . In these circumstances, we cannot say that such a witness is necessarily left remediless in the face of an unlawful search and seizure.

414 U.S. at 354-55 n.10.

the face of an unlawful search and seizure." 414 U.S. at 354-55 n.10. *Calandra* does not bar plaintiffs' action against Brick, and any federal defendants who acted in concert with him, for acting outside of judicial channels in inspecting the materials in court safekeeping and transporting copies back to Washington.

C. *Selection and Seizure of Documents Concededly Irrelevant to Legislative Inquiry*

We hold that even if Brick's examination of the materials had not violated the three-judge court's "safekeeping" order, trial may proceed on plaintiffs' claim that Brick's selection and transportation back to Washington of documents of a private nature[63] which he acknowledged to be irrelevant to the Subcommittee inquiry violated their right of privacy and is outside the protection of legislative immunity.[64] This case is unusual because

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[63] Among the 234 items which Brick carried back to Washington were some "personal letters," as Brick conceded to Government counsel during his testimony at the contempt trial. D.A., II, 727-28. Government counsel, Mr. Bress, acknowledged "that the list of documents, copies of which Brick had but later returned according to the record, contains confidential letters." D.A., I, 431-32. The documents that Brick took to Washington were introduced into the record of the contempt trial as a defendants' exhibit, and are described in D.A., II, 628-49.

Appellees focused particularly on the fact that at least one of these was a love letter to plaintiff Margaret McSurely from Drew Pearson, a prominent columnist (Document No. 201), because Brick's testimony establishes that he not only examined the love letter in Kentucky, took it to Washington, but also singled it out to show to defendant McClellan because it was written by this prominent columnist. D.A., II, 730-31. Defendant McClellan's affidavit acknowledges, without comment, Brick's testimony on this point. App. 60.

[64] Br. for Appellees at 11, 13-15; Amended and Suppl. Compl. ¶¶ 18(b), 19, App. 44-45.

Brick in testimony at the McSurelys' contempt trial conceded that when "he went to Pikeville to examine the documents in the Court House," he looked through the papers and books and determined there were "many" items that he "didn't need at all," including a letter addressed to plaintiff Margaret McSurely, as "Dearest Cucumber," from a prominent newspaper columnist.[65]

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[65] The record contains the following exchange between the McSurelys' counsel, Mr. Stavis, and Brick (D.A., II, 734-36):

Q (Mr. Stavis): Did you tell Mr. Dotson or any of the folk with whom you met there that there was some of that stuff that you didn't think you needed?

A (Brick): Yes.

Q: Did you give it back to them?

A: No.

Q: Did you need that letter signed Dearest Cucumber or addressed, Dearest Cucumber? Mr. Bress (Government counsel): Objection. Irrelevant.

The Court: He may answer the question.

The Witness: No. Didn't you say signed Dearest Cucumber and when it fact it says addressed to Dearest Cucumber.

Mr. Stavis: No, I didn't.

The Witness: Was the question, did I need that letter?

Mr. Stavis: Yes. For the performance of your duties.

A: No, Sir.

Q: As a matter of fact, in respect to the performance of your duties, you didn't need most of the items in that list, did you?

A: Some of them.

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Q: Did you—when I was asking my questions about this list of 234 items, there were lots of these items that you didn't need at all, correct?

Mr. Bress: Objection. Irrelevant.

[Continued]

That the investigation of the McSurelys fell within the broad authorization of the Senate resolution does not render everything done by investigator Brick with respect to the McSurelys privileged activity which is "essential to legislating." For an activity to be considered "essential to legislating" it must be "an integral part of the deliberative and communicative processes" dealing with matters within the jurisdiction of Congress. *Gravel v. United States*, 408 U.S. at 625. Even in the case of investigation by compulsory process, the Court in *Servicemen's Fund* cautioned that "[a]lthough the power to investigate is necessarily broad, it is not unlimited. Its boundaries are defined by its source." 421 U.S. at 504 n.15. The Court cited with approval *Watkins v. United States*, 354 U.S. 178 (1957), which states that "[t]here is no general authority to expose the private affairs of individuals without justification in terms of the function of the Congress," and "there is no congressional power to expose for the sake of exposure." 354 U.S. at 187, 200.

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[55] [Continued]

The Court: I believe he has already answered the question.

By Mr. Bress.

Q. What was your answer?

A. Some, yes.

Q. Some that you did?

A. It was—

Q. Lots?

A. I object to the use of the word lots.

Q. A great many, a good many?

A. Oh, I will say many.

Let me explain.

I didn't select any of these as I told you.

In the usual case if the activity is arguably within the "legitimate legislative sphere" the Speech or Debate Clause bars inquiry even in the face of a claim of "unworthy motive." As Justice Frankfurter explained in *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951):

> The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based on the jury's speculation as to motives.

The principle is designed to give legislators and their aides a certain measure of elbowroom to pursue legislative activity without the inhibitions that necessarily flow from exposure to suit because of the mere "conclusion of a pleader" or "a jury's speculation as to motives."

However, the immunity shield that protects conduct of legislators and staff in an area that is at least arguably within a proper legislative sphere, that pertains to a subject "on which 'legislation could be had,'" *Eastland v. United States Servicemen's Fund*, 421 U.S. at 504 n.15, and in such sphere protects against lawsuits that are based on mere allegation or speculation, is not a license to invade privacy where no legislative purpose can be plausibly interposed. The fact that Brick took and transported *concededly* extraneous material—and it is significant that he seized "some personal letters"—takes this case outside the protection of legislative immunity. While *Servicemen's Fund* notes the legislative nature of investigation, it reiterates that the subject

must be one on which "legislation could be had."[66] Brick's testimony at the contempt trial ultimately may

[66] Doe v. McMillan states the rule for inquiry into matters arguably relevant to legislative tasks. In *Doe* the Court cautioned that it had "no authority to oversee the judgment of the Committee. . . or to impose liability on its Members if we disagree with their legislative judgment." 412 U.S. at 313. The Court declined to second-guess a committee's decision to include names of specific children and descriptions of their conduct in the record of its hearings on the District of Columbia public schools and in a committee report. "The report stated that these materials were included to 'give a realistic view' of a troubled school and 'the lack of administrative efforts to rectify the multitudinous problems there.'" *Id.* at 308-09. Since the accounts of the students' conduct were broadly related to the subject matter of the committee's inquiry, the Court properly refused to enmesh itself in reviewing the usefulness or necessity of the degree and type of details included in the illustrative material assembled by the committee.

Here the McSurelys make no claim that names or descriptions of *arguably* extraneous activities should have been deleted by Brick or the Subcommittee from documents pertinent to the Nashville disturbances. Rather they claim that material dealing with intimate subjects completely foreign to the committee's inquiry was taken back to Washington. Of course, "the legitimacy of a congressional inquiry" is not "defined by what it produces." Eastland v. United States Servicemen's Fund, 421 U.S. at 509. But knowing retention and transportation of highly private, embarrassing papers, in the absence of a *claim* of conceivable legislative interest, can serve no legitimate legislative function and can have "no relation to the business before" Congress.

As previously noted (see text at p. 26 & note 49 *supra*), Brick testified at the contempt trial that he did not concern himself with items in which he had absolutely no interest. But if his interest in taking personal items was of a personal nature, whether for his benefit or for the benefit of his superiors, rather than a legislative interest, there is no legislative immunity from suit.

be explained away to the satisfaction of a jury."[67] But it is plainly sufficient to preclude an automatic dismissal of the lawsuit at the threshold, on the basis of legislative immunity."[68] "To hold otherwise would be to invite gratuitous injury to citizens for little if any public purpose." *Doe v. McMillan*, 412 U.S. at 316-17.

IV. Protected Legislative Conduct

We turn to the allegations pertaining to staff inspection within the Subcommittee of the 234 photocopies, the use of the copies as the basis for issuance of subpoenas for some of the documents, and the procurement of contempt of Congress citations against plaintiffs. Here, we find further inquiry barred by the Speech or Debate Clause.

The law is clear that even though material comes to a legislative committee by means that are unlawful or otherwise subject to judicial inquiry the subsequent use of the documents by the committee staff in the course of official business is privileged legislative activity.[69] In

[67] Appellants suggest that Brick was merely "testifying to his ultimate conclusion that the private correspondence was unnecessary to the performance of his duties," rather than to the determination made at the time he decided to transport the documents to Washington. Reply Br. for Appellants at 5-6 n.6.

[68] It has been clear since Dombrowski v. Eastland, 387 U.S. 82 (1967), that the rule that prohibits lawsuits with respect to legislative activity on mere speculative pleading does not operate to provide immunity when there has been a meaningful proffer that the conduct in question was not "essential to legislating."

[69] The rule is different where Congress seeks the affirmative aid "of the Judiciary to enforce its will" in criminal prosecutions for contempt. In that context constitutional rights may be balanced against the claim of legislative privilege because the court's performance of the judicial function

Dombrowski v. Burbank, 123 U.S.App.D.C. 190, 192-93, 358 F.2d 821, 823-24 (1966), this court refused to enjoin the chairman and chief counsel of a Senate subcommittee from using records that had been seized by state officials in an alleged conspiracy with the subcommittee. "Since the documents are now held by the Subcommittee, they are accessible to the [defendants] only by virtue of their official positions with that body. We cannot prohibit, nor are we asked to prohibit, [their] use of the documents in the course of their official business for the Subcommittee; and neither do [plaintiffs] seek any restraint upon the Subcommittee itself." [70] We also held the defendants immune against answerability in damages for the issuance of subpoenas to obtain the records.[71] The Supreme Court upheld our disposition of the "claims which related to the take-over of the records by respondents *after* the 'raids.'" *Dombrowski v. Eastland*, 387 U.S. at 83-84 (emphasis in original). Similarly in *Gravel v. United States*, although the Court permitted grand jury inquiry as to third-party crime or criminal acts by

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requires it to scrutinize "the predicates of the criminal prosecutions." Eastland v. United States Servicemen's Fund, 421 U.S. at 509-10 n.16. *See* Tenney v. Brandhove, 341 U.S. at 378; Watkins v. United States, 354 U.S. at 216 (Frankfurter, J., concurring).

[70] *Citing* Hearst v. Black, 66 U.S.App.D.C. 313, 87 F.2d 68 (1963), where this court refused to enjoin a congressional committee from using information obtained by having the Federal Communications Commission take possession of telegraph offices and examine wholesale private messages received and dispatched therefrom over a period of seven months. The court noted that a victim of the unlawful dragnet seizure of telegraph messages could not be held in contempt for refusing to answer questions based on the unlawfully procured information, and that an injunction could properly issue to enjoin such a trespass were it still in progress, but refused to exercise its equity power to restrain use of material physically in the possession of the committee. *Id.* at 316, 87 F.2d at 71.

[71] 123 U.S.App.D.C. at 193-95, 358 F.2d at 824-26.

the Senator or his aide "relevant to tracing the source of obviously highly classified documents," it barred questioning as to the Senator's or his aide's conduct at the subcommittee meeting where the documents were read into the record, the motives behind that conduct, communcations between the Senator and his aide during the term of their employment which were related to the meeting or any other legislative act of the Senator, and any act not in itself criminal performed in preparation for the meeting. 408 U.S. at 628-29.

Likewise foreclosed is plaintiffs' claim of invasion of privacy based on retention and display of their private papers within the Subcommittee for non-legislative purposes.[72] Although the federal defendants are not immune from inquiry as to dissemination of the 234 photocopies to individuals or agencies outside of Congress, dissemination within the Subcommittee is privileged activity.[73] The mere retention—without dissemination or use—of the copies cannot be the subject of judicial inquiry. Such retention may be subject to abuse, but judicial inquiry on a claim that documents were retained beyond the time needed to determine relevancy to legislative purpose would embroil the courts in the kind of review of legislative

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[72] Br. for Appellees at 7; Amended and Suppl. Compl. ¶¶ 18(b), 19, App. 44-45. *See* note 66 *supra*.

[73] *See* Doe v. McMillan, 412 U.S. at 312-13.

We are not suggesting that everything physically done within the Halls of Congress is immune to questioning. Legislative functionaries that execute a resolution authorizing an arrest, Kilbourn v. Thompson, 103 U.S. 168 (1881), or excluding a representative-elect, Powell v. McCormack, 395 U.S. 486 (1969), without basis in congressional power are subject to judicial inquiry. However, under *Doe v. McMillan* the act of dissemination of otherwise actionable material is protected activity, at least absent concession by the disseminators that material was distributed for non-legislative purposes.

performance that is prohibited by the Speech or Debate Clause.[74]

The same applies to the claim based on the Subcommittee's issuance of the two sets of subpoenas and attempt to enforce the second set by citing the McSurelys for contempt of Congress. The Subcommittee here employed proper process for information "on which 'legislation could be had.'" [75] We note that the subpoenas called for materials that were at least arguably relevant to its investigation, but did not call for the production of Mrs. McSurelys' letter or any other demonstrably irrelevant private correspondence.[76] Under these circumstances

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[74] We note that Brick testified at the contempt trial that the 234 documents were maintained "by order of Senator McClellan" in Brick's personal file under lock and key, and that the personal letter to Margaret McSurely from Drew Pearson was displayed to Senator McClellan and then placed in a sealed envelope "to be opened only by John Brick, J. S. Adams, General Counsel and Senator McClellan." D.A., II, 729, 732-33. Defendant McClellan acknowledged this testimony in his affidavit. App. 60. In the absence of the kind of admission that was present with respect to Brick's selection and transportation of irrelevant material back to Washington, judicial inquiry must come to a halt.

[75] Eastland v. United States Servicemen's Fund, 421 U.S. at 504-07 & n.15.

[76] The subpoenas in issue are reproduced at App. 70-74. Concerning the scope of this subpoena, appellants state (Reply Br. 7-8):

> [T]he Subcommittee subpoenas called for materials clearly relevant to its investigation, but did not call for the production of Mrs. McSurely's letter [8] or any other private correspondence.

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[8] We have never seen this letter and have had no interest in attempting to discover it. However, if plaintiffs' contention that this letter was nothing more than a love letter, and was not relevant to any possible investigation into riots, is correct, it necessarily follows that the letter would not have been subject to production under the subpoena. And any suggestion that the subpoenas were utilized to obtain production of such private correspondence would be totally unfounded.

Servicemen's Fund prevents further inquiry into plaintiff's charge that the Subcommittee's purpose was to harass and intimidate them in the exercise of their First Amendment rights.[77] The Subcommittee's issuance of subpoenas is privileged activity, notwithstanding plaintiffs' bare allegation that the real purpose behind the subpoenas was to "cover-up" the earlier improper conduct by Brick, and the further assertion that had there been full disclosure the Subcommittee would not have issued the subpoenas, and the Senate would not have approved the contempt citations.[78]

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[77] The Supreme Court refused to cut back on "the absolute nature of the speech or debate protection" even in the face of allegations that First Amendment rights were being infringed by congressional action. 421 U.S. at 509-10.

Servicemen's Fund involved an attempt to enjoin issuance of a subpoena duces tecum by a Senate subcommittee. We think its rationale applies to an action for damages resulting from a subpoena that has issued, as opposed to an action maintained by the Government to prosecute non-compliance with a subpoena. *Compare id.* at 509-10 n.16.

[78] *See* Dombrowski v. Burbank, 123 U.S.App.D.C. at 194, 358 F.2d at 825, where this court dismissed the claim that the subcommittee chairman and chief counsel were acting outside the scope of their authority because the records were subpoenaed without prior subcommittee authorization, although the subcommittee chairman approved in advance the action taken. We held that subsequent ratification by the full subcommittee was sufficient, given the subcommittee's long-standing interest in the matter at issue, to preserve defendants' immunity against liability in damages for issuing and executing the subpoena. Wheeldin v. Wheeler, 373 U.S. 647, 650-51 (1963), was distinguished as a case involving service of a subpoena "which had been approved by no one, either before or after its issuance."

V. On Remand

We hold, as a matter of law, that appellants are entitled to summary judgment on the allegations in the amended complaint pertaining to the Subcommittee staff's inspection of the 234 documents that Brick brought to the Subcommittee, the utilization of the information obtained by Brick as the basis for congressional subpoenas, and the issuance of contempt of Congress citations against the McSurelys. Since no allegation has been made as to conspiracy in the original raid of the McSurelys' home, appellants are entitled to dismissal on this point.

We leave for the District Court on remand the initial determination as to (1) whether any cause of action against defendants Brick and Adlerman survives their deaths; (2) whether Brick's inspection of the seized material put in Ratliff's possession under the three-judge court's "safekeeping" directive, and Brick's transport to Washington of copies of 234 documents, violated the McSurelys' rights under the Fourth Amendment; (3) whether Brick selected and transported to Washington copies of documents he knew to be wholly unrelated to the legislative inquiry, and, if so, whether such conduct was actionable under the applicable law; (4) whether any other federal defendants acted in concert with Brick in action for which he enjoys no legislative immunity; (5) whether any of the federal defendants distributed copies of documents in the Subcommittee's possession to individuals or agencies outside of Congress, and, if so, whether such distribution was actionable under the applicable law; and (6) other matters identified in this opinion as requiring further development. Of course, if Brick or the other appellants have defenses to liability, other than the claim of absolute immunity from suit, these should be pleaded and would be a matter for initial determination by the District Court.

Although plaintiffs have alleged Brick's involvement in possible actionable conduct with sufficient factual particularity to permit trial to proceed as to him, the record at present is silent on the involvement of defendants McClellan, Adlerman and O'Donnell "in any activity that could result in liability." *Dombrowski v. Eastland*, 387 U.S. at 84. Plaintiffs allege that the latter defendants were acting in concert with Brick in the actions that are pertinent. If that is so, they enjoy no greater immunity for conduct not "essential to legislating" than Brick, their agent. Of course, an allegation is not proof. But at this stage of the case, given that the argument of parties thus far has been drawn in terms of whether or not the Speech or Debate Clause erects a complete barrier to this action, we are unable to say on the basis of the undisputed facts that the other federal defendants are constitutionally entitled to summary judgment excusing them from further inquiry, even though Brick is not. The path remains open for these defendants to make a renewed motion for summary judgment on the ground that the McSurelys have failed to adduce specific facts "which afford more than merely colorable substance," *Dombrowski v. Eastland*, 387 U.S. at 84, to the assertion of concert with Brick in conduct that survives the legislative immunity bar. Since the Speech or Debate Clause acts as an exclusionary rule and testimonial privilege, as well as substantive defense, plaintiffs must prove their case through evidence which "does not draw in question the legislative acts of the defendant Member of Congress [and his aides] or [their] motives for performing them." *United States v. Brewster*, 408 U.S. at 526, *quoting United States v. Johnson*, 383 U.S. at 185.

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SUPPLEMENT

Since our opinion anticipates many of the points raised in Judge Wilkey's opinion, we have decided not to retrace and interlard the body of the opinion with responsive material. We think it more useful to provide focus through the vehicle of a supplemental statement.

I.

Most of Judge Wilkey's characteristically vigorous opinion is beside the point. He assumes that the Fourth Amendment liability of Congressional investigator Brick is premised on the acceptance and use of the fruits of the unlawful activity of another.[79] On the contrary, our ruling is based on the investigator's own unlawful activity—the inspection and transportation of copies of materials in violation of a three-judge federal district court order.

We need not be detained by Judge Wilkey's traverse of cases like *Calandra*, *Elkins* and *Sherwin*. What makes all the difference in the world is that in this case a Federal court did issue an order, did make a determination that papers and other material had been seized by state authorities under an unconstitutional statute, did assert custody over the seized documents, and that investigator Brick examined them and took copies without resort to the procedures of the Federal court that had intervened and asserted control over the materials. It would not be analysis but legerdemain, to characterize Brick's actions in violation of a court order as part of a subsequent "transfer" inherently unreachable

[79] Whether another agency of the Federal Government, United States v. Calandra, 414 U.S. 338 (1974); an agent of a state, United States v. Elkins, 364 U.S. 206 (1960); or a private individual acting without any governmental encouragement, United States v. Sherwin, No. 73-3124 (9th Cir., July 2, 1976) (en banc).

under the Fourth Amendment. The case is entirely different from *Calandra*.[80]

[80] In *Calandra*, the wrong was "fully accomplished by the original search," 414 U.S. at 354. Here the McSurelys claim that the investigator's conduct in violation of a court order worked a "new Fourth Amendment wrong." It is not simply a matter of the timing of the judicial determination of illegality. The gravamen of the McSurelys' complaint is that Brick acted in violation of the order of a court that had intervened on constitutional grounds with a ruling that entitled the McSurelys to immediate return of what had been seized, if the ruling were implemented immediately, and that accompanied a deferral of that consequence in order to avoid mootness, pending appeal to the Supreme Court, with an order restricting access to those seized materials.

Judge Wilkey (at pp. 33-36) misconstrues our discussion of *Calandra*, and erroneously equates Brick's conduct with the situation in *Calandra*.

In *Calandra* the grand jury got its access to the documents before there was any judicial determination that they had been invalidly seized. The subpoena that it issued as a result of this access could not be quashed, held the Court. (Of course, the grand jury's access was handled by the prosecutor who acted as its aide.) Likewise, in the present case, the court would not quash the subpoena issued by the subcommittee as a result of the access it got to the documents. But the person(s) who provided that access did so after a judicial determination of invalidity, and that makes the difference from *Calandra* in determining liability in damages. This matter of timing was identified by Justice Powell when he distinguished Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), in part because "prior to the issuance of the grand jury subpoenas, there had been a judicial determination that the search and seizure were illegal." 414 U.S. at 352 n.8.

The facts show that the grand jury's subpoena to Calandra —obviously issued *before* the suppression hearing of August 27, 1971, or the trial court ruling of October 1, 1971 granting Calandra's motion to suppress—was explicitly identified by the Court as an instance when the grand jury "subpoenaed Calandra in order to ask him questions *based on the evidence seized during the search of his place of business on December 15, 1970.*" 414 U.S. at 341 (emphasis added).

We do not think it can be seriously argued that conduct like Brick's, compounding his own inspection of documents with transportation to permit access by others, fails to state a Fourth Amendment violation in a case where there has been a court order that establishes a custodian with possession (pending appeal) of papers seized unlawfully from plaintiffs, and provides that any other access requires court approval (in the absence of permission by plaintiffs).

Judge Wilkey misses the point in his argument (*e.g.*, at p. 29 ff.) that Brick's activity involves no legal injury not already wrought by the state officials. Even assuming for discussion plaintiffs had no valid claim against any state officials for the seizure from their home, perhaps on the theory that the taking was under a warrant to enforce a state sedition statute not yet held unconstitutional, plaintiffs may nevertheless maintain an action against Brick for his inspection and taking of papers after the federal court held invalid both the state statute and the continued retention of the seized materials by the state prosecutor except as a court custodian.

Judge Wilkey's opinion rests on a restricted reading of the court's "safekeeping" order of September 14, 1967.

Physical preservation of the *res*—during the course of a potential appeal to avoid mootness problems—was one of the court's concerns but by no means the only or even predominant concern. This emerges from an examination of the decision itself. The order accompanied a full-scale decision on the merits, granting substantial relief to the McSurelys on First Amendment grounds. In addition to declaring the state sedition statute unconstitutionally vague and overbroad, the court enjoined

state prosecutions pursuant to the statute under the authority of the landmark *Dombrowski v. Pfister*, 380 U.S. 479 (1965). The injunction issued largely because the court perceived a concerted effort by state and county officials to "freeze" the McSurelys and their associates out of Pike County. The court's language on this point is illuminating. "The conclusion is inescapable that criminal prosecutions were instituted at least, in part, in order to stop plaintiffs' organizing activities in Pike County. That effort has been successful. Not only has there been the 'chilling effect' on freedom of speech referred to in *Dombrowski*, there has been in fact a freezing effect." *McSurely v. Ratliff*, 282 F. Supp. 848, 852-53 (E.D.Ky. 1967).

Judge Wilkey seeks to avoid the absurdity of a construction that would make this a mere "hold safe" order by repair carpentry, that the order at least in "spirit," may have required Ratliff to deny access to some "prosecutors" (p. 18), yet authorized him to grant access to anyone he deemed to have a legitimate interest (p. 28).

Given the context of the court's order, and its sensitivity to the First Amendment dimension of the actions taken by Kentucky authorities against the McSurelys, the sensible reading of the court's order, and the one adopted by this court in 1972,[81] is that Ratliff was directed to hold the materials as co-custodian for the court,

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[81] Our court in 1972 may or may not have had before it the text of all the orders of the Kentucky three-judge court, but there is no doubt that it was fully aware of their thrust. This matter was adequately summarized in the Sixth Circuit decision ordering the return of the documents once the time to appeal had expired. McSurely v. Ratliff, 398 F.2d 817, 818 (6th Cir. 1968).

As to Judge Wilkey's attempt to dismiss this court's earlier characterization of the scope of the "safekeeping" order as dicta, *see supra* n.44, or as bad law after *Calandra*, *see supra* pp. 32-34 & nn.61 & 80.

during the period allowable for appeal, not with a right to grant access to others as he might determine in the exercise of personal discretion, but with questions of access to or other use or disposition of the materials reserved for determination by the court. Ratliff himself was apparently of this view, for he tried to obtain the court's permission before acceding to Brick's request for access. There is nothing in the record as it stands that rebuts this reading of the "safekeeping" order.

Judge Wilkey's opinion makes much of the court's orders of October 30 and December 13, 1967, issued before the time to appeal the September 14 ruling had expired. These orders pertained to a motion by the McSurelys to enjoin Ratliff from releasing any of the seized materials called for by the Subcommittee subpoena.[82] The court refused to block the Subcommittee's access by way of subpoena to the seized materials. Judge Wilkey's opinion assumes that this refusal to interfere with a facially proper subpoena of a Congressional subcommittee "on a subject on which legislation could be had" is a sub silentio approval of the challenged activity of Brick prior to and in the absence of a subpoena or ruling, and establishes that Brick's activity had not contravened the court's order.

Out of the blue, Judge Wilkey's opinion conjures up a judicial determination by the three-judge court. It does not even appear that Brick's pre-subpoena investigation and transportation of copies of the seized documents had been raised as an objection to the subpoena.[83] More

[82] The October 30, 1967 order may not make specific reference to the word "subpoena," but the motion of the McSurelys was unmistakably addressed to the subpoena that Brick had served on October 17.

[83] See *supra* pp. 30-32 & n.59. Ratliff testified he contacted one of the judges, but we do not know what in fact transpired. His oblique assertion "I had my permission" may be relevant

importantly, Judge Wilkey's opinion does not claim that applicable legal doctrine established then or establishes now that prior invalidity under the Fourth Amendment in obtaining documents—however vulnerable in a damage action—would have been material as authorizing a court to interfere with a subpoena of a subcommittee. There is neither a statement by the three-judge court nor any basis for implication that the three-judge court considered it material.

The Supreme Court ruled in *United States Servicemen's Fund v. Eastland*, 421 U.S. 491 (1975), that notwithstanding allegations of First Amendment violations the judiciary may not prevent implementation of a Senate subcommittee subpoena duces tecum directing certain banks to produce records of a particular account. We are not called upon to determine whether *Servicemen's Fund* applies when the records sought are in the custody of the court. It is enough—on this motion for summary dismissal of the damage action—to say that the action of the three-judge court in declining the McSurleys' invitation to hamper a subpoena investigation of a coordinate branch of government, *cf. Hearst v. Black*, 66 U.S.App.D.C. 313, 87 F.2d 68 (1936), is not inconsistent with its having a view that the McSurelys could have redress in damages for Brick's pre-subpoena conduct.

We hold that the District Court correctly denied the motion to dismiss or for summary judgment on the claim of a Fourth Amendment violation by Brick and the federal defendants who acted in concert with him.

to a defense of good faith on the merits, but it hardly establishes that he had approval of the court. Any failure on the McSurelys' part to raise Brick's activity as a ground to block compliance with a subpoena, assuming it were cognizable, would not be an absolute bar to this private action for damages from Brick's pre-subpoena activity.

The showing made by the McSurleys suffices to avoid any absolute bar to suit, particularly when it is compared with the proffer, held sufficient in *Dombrowski v. Eastland*, 387 U.S. 82, 84 (1967), involving a possible misdating of a committee subpoena with the result that the date of the subpoena coincided with the date of the original search and seizure by state authorities. On the record as it presently stands, Brick is not entitled to demand absolute immunity from suit as a matter of law, and we need not consider the possibility that the defense may hereafter find and adduce material from the record of the three-judge court that would advance the kind of speculation raised by Judge Wilkey.[*]

II.

We turn to the McSurelys' privacy claim against Brick. Since this appeal presents only the threshold question of immunity, we have no occasion to indicate whether they have pleaded a good cause of action or there are defenses on the merits. *Doe v. McMillan*, 412 U.S. 306, 325 (1973).

Assuming for discussion that the McSurelys do not have a cause of action for constitutional tort, because of the reasoning of *Paul v. Davis*, 424 U.S. 693 (1976), or other authority, they may have a good claim for common law invasion of privacy that is maintainable in federal

[*] Although the record as it stands would support a finding of Fourth Amendment violation, we are not now decreeing such a judgment. The parties have not even filed in this case copies of the record that was before the three-judge court and Sixth Circuit. The orders of the three-judge court relied on by Judge Wilkey—and which we find fall short of the claims made by him—were obtained after oral argument en banc by Judge Wilkey.

Our judgment allows opportunity for the parties to make a systematic search of the proceedings of the three-judge court and to present to the trial court proof and arguments based thereon.

court under the doctrine of pendent jurisdiction, *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), and may accordingly move to amend their pleadings to conform to the evidence, F.R.Civ.P. 15(b). Under *Doe v. McMillan*, *supra*, these are matters that should not be decided on a motion that did not present anything more than a threshold barrier of absolute legislative immunity from suit.

Of course, Brick's concession cannot bind the Subcommittee, its members, or other of its agents. As to the privacy claim against Brick, Judge Wilkey speculates as to plausible legislative purposes behind Brick's seizure of a love letter and other personal documents. On the record as it stands, Brick by his own mouth conceded that "many" of the items he brought to Washington were unrelated to his duties. Conceivably this testimony may be explained away. As of now we are not aware that any claim of legislative need has been interposed for the love letter from Drew Pearson to Margaret McSurley—a letter that Brick testified he held in his personal file, under lock and key, on direction of Subcommittee chairman McClellan.[*] Certainly the record as it stands does not entitle Brick to summary judgment.

[*] Senator McClellan's affidavit is silent on this point. App. 60. There is no indication in the present record that legislative use was made of the letter in question. *See supra* n.74.

WILKEY, *Circuit Judge*, with whom joined DANAHER, *Senior Circuit Judge*, TAMM, MACKINNON, and ROBB, *Circuit Judges*, dissenting: The majority remands this case for trial on three of the seven claims advanced by the plaintiffs McSurelys, on the ground that, if established, the actions of the defendant Senator and his aides fall outside the protection of the Speech or Debate clause. With regard to one of these subjects of inquiry, the alleged dissemination of the McSurely documents outside the legislative sphere, we are in accord. This was the result reached by the panel opinion.[1] With the majority action on two of the asserted claims of the McSurelys made the subject of the remand, the inspection and transportation of the McSurely documents from Pikeville, Kentucky to Washington, D.C., we are in serious disagreement.[2]

The bottom line of the McSurelys' suit on these two points must be that the actions of the Senate investigator Brick constituted an "unreasonable search and seizure" within the meaning of those words in the Fourth Amendment, for if they did not, the investigative actions

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[1] 521 F.2d at 1048. This was No. (7) of the seven categories of claims listed in the majority opinion (p. 11) and in the panel opinion, 521 F.2d at 1033.

[2] "(2) The inspection by Brick of these unlawfully seized materials. (3) The transport by Brick of copies of 234 documents to Washington." Majority Op. at 11. With regard to "(1) The unlawful search and seizure of the McSurelys' books and papers by Kentucky authorities," the majority holds that the "appellants are entitled to dismissal at this juncture of any claim that they participated in the initial unlawful seizure by the Kentucky officials." (p. 21) We agree. With regard to claims (4), (5), (6), the majority holds that "We find further inquiry barred by the Speech or Debate clause." (p. 39) We agree that this is "privileged legislative activity."

of the Senate aide were admittedly [3] protected by the Speech or Debate clause.[4]

Many of the key facts have been expressly stipulated [5] by counsel for the McSurelys and the United States and

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[3] The majority states the principle, which we endorse, that investigative activity is so essential to the legislative process that it is ordinarily absolutely privileged, provided, of course, that the basic conditions of authorization and pertinency are established. Maj. op. at 17-19. But this absolute privilege can be lost where the investigator engages in a search and seizure in violation of the Fourth Amendment. *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967), cited by the majority at 19.

[4] The McSurelys also assert a claim of violation of privacy against Brick alone (Maj. Op. 34-39) based on the alleged irrelevancy of some of the documents inspected, copied, and transported by Brick. If cognizable at all by a federal court, this claim would be based on a Fifth Amendment due process violation. As we show later, Part IV, the Supreme Court has recently held in *Paul* v. *Davis*, 44 U.S.L.W. 4337 (23 March 1976) that such common law tort actions can not be based upon Fifth Amendment or other constitutional grounds.

[5] See Maj. op., note 7. Brick has testified to these facts in the previous trial of contempt of Congress, and he is now dead. Commonwealth Attorney Ratliff has testified to these facts; his testimony stands uncontradicted, and, indeed, is relied upon by the majority opinion, and by the McSurelys. The majority does characterize Ratliff's testimony on one point, his conversation with Judge Moynahan, as "oblique." Maj. op. 29, note 54. But even to the extent that this characterization is fair and more testimony by Ratliff or Moynahan would amplify the conversation, a finding of actual consent is not necessary to a decision on the scope of the custody order. If the inspection and copying are found to be violations of the Fourth Amendment, then the resolution of Ratliff's and Brick's claims of good faith immunity from damages may be aided by fuller testimony on efforts to obtain judicial consent. Here, however, on the issue of violation, we believe that the record shows that Brick and Ratliff acted in conformity with the orders of custody. A further finding of actual consent would be only cumulative and does not justify a remand.

many others appear uncontradicted from prior testimony. All the relevant court orders and decisions are before us, in addition to the relevant uncontroverted facts. From all this settled evidence, as we shall demonstrate, it can be determined as a matter of law that the inspection and copying did not violate the custody order. Thus, it is likewise not necessary to supplement the text of the motions and the orders with further findings about the details of prior arguments, as the majority suggests would be "benefi[cial]" for an understanding of the custody order.[6]

Indeed, the plaintiffs McSurelys make no claim on the issues of the inspection, copying, and transport of the documents that any additional facts need be or can be brought out. The McSurelys' claim rests on the argument that the admitted actions violated their rights under the Fourth Amendment and thus were not protected by the Speech or Debate clause. It is this argument which the trial court sustained in denying defendants' motion for summary judgment and with which we understand the majority here to agree. The defense left to the Senator and his aides on trial thus would be a good faith defense justifying admitted actions, which the trial court and this court find did constitute violations of the Fourth Amendment.

This is not the full immunity of members of Congress and their aides, engaged in carrying out legislative duties, guaranteed by the Speech or Debate clause of our Constitution. The disposition of the case here by the *en banc* majority requires the Senate defendants to undergo trial in the District Court,[7] precisely that against which the Speech or Debate clause was designed to protect. Of

[6] Maj. op. at 31, note 59.

[7] We discuss later how the nature of the remand here erodes the principle of the Speech or Debate clause

course, the defendants will have the protection of qualified immunity, as in *Bivens* v. *Six Unknown Agents*[8] or *Scheuer* v. *Rhodes*.[9] Yet, as Justice Powell so recently wrote in *Imbler* v. *Pachtman*:

> The procedural difference between the absolute and the qualified immunities is important. An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial.[10]

The issue here, as it was in the trial court on motion for summary judgment by the Senate defendants, is on the law. While the majority at the outset of their opinion states "[t]he sole issue here is whether the federal defendants enjoy absolute immunity under the Speech or

[8] 403 U.S. 388 (1971). *See also Bivens* v. *Six Unknown Agents*, 456 F.2d 1339 (2d Cir. 1972) (on remand).

[9] 416 U.S. 232 (1974).

[10] *Imbler* v. *Pachtman*, 44 U.S.L.W. 4250, 4253 n. 13 (2 March 1976).

The McSurelys have obviously employed a *counter-offensive technique* here. "The action for damages presently under consideration was originally filed in the District Court for the District of Columbia on March 4, 1969, the same day that the McSurelys appeared before the Subcommittee." (Majority op. 9) To the extent that members of Congress and their staff can be embroiled in defending private suits for damages, arising out of their legislative activities, to the same extent may the more timid members of Congress be discouraged in carrying out their duties. The same counter-offensive technique could likewise be employed against judges, prosecutors, and other public officials if hitherto established absolute immunity is allowed to be cut down, as the majority opinion does here, to only a qualified immunity.

Debate Clause,"[11] their analysis and ours make clear that the absolute immunity of the Speech or Debate clause applies unless there was a violation of the plaintiffs' Fourth Amendment right to be free from "unreasonable searches and seizures."

After a tangential approach to this basic underlying issue,[12] the majority opinion does refer to Brick's "search-and-taking" (p.30), the "search and seizure of Brick" (p.32), and then asserts flatly "two separate, independent search and seizures took place here" (p.33).

With this holding our colleagues make new law. The transfer from one investigative agency to another is not a "separate, independent search and seizure," and, as we show later, the rationale of all the Supreme Court "silver platter" decisions[13] and the recent *en banc* specific holding of the Ninth Circuit in *United States* v. *Sherwin*[14] are directly contrary.

New law it is, but law absolutely necessary to the majority's holding that the McSurelys' Fourth Amendment rights were violated here, for without an "unreasonable search and seizure" by the Senate aide his investigative activities and related acts by his superiors are admittedly protected by the Speech or Debate clause.

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[11] Maj. op. 10.

[12] With perceptible reluctance the majority initially characterizes the actions of Brick as being "a *wrongful inspection and transportation* of documents (causing constitutional injury) which were independent of the initial raid by the Kentucky officials" (maj. op. 21-22, emphasis supplied) and, later states "Brick committed an independent Fourth Amendment violation by his *unauthorized inspection and transportation* back to Washington of the 234 documents." (maj. op. 22, emphasis supplied)

[13] *E.g.*, *Lustig* v. *United States*, 338 U.S. 74, 78-79 (1949).

[14] 539 F.2d 1 (1976).

To see how the Senate investigator's "Inspection and Transportation of Documents Held in 'Safekeeping' by Court Order"[15] could never, on all logic and precedent, be held an "unreasonable search and seizure" within the Fourth Amendment, it is important to give a detailed chronological description of these events, putting in proper perspective the actions by the Kentucky officials, the Senate investigators, and the United States courts.

I. Sequence of Actions by Kentucky Officials, Senate Investigators, and United States Courts

Under authority of a judicial warrant charging seditious activities against the Commonwealth of Kentucky in violation of KRS 432.040, on 11 August 1967 officials of Pike County arrested the McSurelys and seized a large volume of books, posters, pamphlets, and other private and published documents found in their home. Immediately following their arrest the McSurelys filed a complaint in the United States District Court for the Eastern District of Kentucky, challenging the constitutionality of the Kentucky sedition statute and requesting that the matter be heard by a three-judge court.[16] On 17 August a hearing was held before U.S. District Judge Moynahan, at the close of which an order was entered denying plaintiffs' motion for a temporary restraining order, denying plaintiffs' motion to impound the material seized by the Commonwealth of Kentucky, and granting the motion for a three-judge court.[17]

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[15] Maj. op. at 17-34.

[16] Civil Action No. 1146. In addition to Thomas B. Ratliff, Commonwealth Attorney, the other defendants were Perry A. Justice, Sheriff of Pike County, Grover Atkins, Jailer of Pike County, and Robert L. Matthews, Attorney General for the Commonwealth of Kentucky.

[17] Order of 17 August in No. 1146, signed by Moynahan, J.

On 1 September 1967 a hearing was held before Combs, Circuit Judge, and Gordon and Moynahan, District Judges, sitting as a three-judge District Court in Pikeville.[18] Following the hearing an order was issued on 11 September 1967, recording among other events, "Mr. Kuntsler then moved the Court to direct the Marshal to impound the material seized by the Pike County Sheriff and to direct the defendants to safe guard such materials so seized as may be in their custody and control." Pursuant to this request of plaintiffs' attorney, the order recited, "The parties having agreed thereto, it was further ordered by the Court that the material, literature, and all objects seized herein shall be kept in the custody of the defendant, Thomas B. Ratliff, and that same shall be made available to the United States Marshal for the Eastern District of Kentucky; and that said United States Marshal and the defendant, Thomas B. Ratliff, shall forthwith make an inventory thereof and file same in the record herein." The court further ordered that Ratliff should return to the plaintiffs "such personal articles and property as he does not deem material to the investigation and prosecution herein."

On that same day, 11 September, the grand jury of Pike County returned an indictment against the McSurelys charging them with seditious activities against the Commonwealth in violation of KRS 432.040.

However, on 14 September the three-judge U.S. District Court rendered its decision holding KRS 432.040 facially unconstitutional and enjoining state prosecution of the McSurelys.[19] In the final paragraph of its order the three-judge court stated,

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[18] Pursuant to order of 30 August 1967 issued at Lexington, Kentucky.

[19] The U.S. Court also ordered that "all the plaintiffs be placed under bond to this court in the amount of five thousand dollars ($5,000.00) each on their own recognizance to make themselves amenable to the further orders of this court."

> It is further ordered that *all books, papers, documents, and other material now in the custody of the Commonwealth Attorney* of Pike County, Ratliff, reflected by the Inventory filed in this action *continue to be held by him in safe keeping until final disposition of this case by appeal or otherwise.*[20]

The wording of this order, which established the nature of the Commonwealth Attorney's custody two weeks before any inquiry was made by the Senate Subcommittee re the documents, and the wording of the order of 30 October, in response to the McSurelys' effort to bar Senate access to the documents, along with the intervening meeting of Ratliff with Judge Moynahan, are vital to an understanding of the legitimacy of the actions of both Ratliff and Brick.

For the first time, according to the record in this and all other related cases, an employee of the United States Senate then took action in regard to the McSurelys. On 25 September 1967 Lavern Duffy, Assistant Counsel to the Permanent Subcommittee on Investigations (Subcommittee) of the Senate Committee on Governmental Operations (Committee), called Commonwealth Attorney Ratliff by telephone from Washington to inquire about the seized items.[21] On Sunday, 8 October John Brick, an in-

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[20] In explanation of their order the judges issued opinions on 18 and 20 October. 282 F. Supp. 848 (E.D. Ky. 1967). The language used in the opinion refers to Commonwealth Attorney Ratliff's custody of the documents, but nowhere is there implied secrecy or confidentiality or any other object other than the preservation of the documents for such purposes as may be relevant in the legal proceedings in the federal and/or Kentucky courts.

[21] Testimony of Thomas B. Ratliff, in the trial of Alan and Margaret McSurely for contempt of Congress before U.S. District Judge John Lewis Smith, Jr., 24 June 1970 (*United*

vestigator employed by the Senate Committee and assistant to Duffy, came to Pikeville. After Brick explained to Ratliff the purpose of the Senate investigation, and confirmed that the McSurely material contained information relating to the activities of a number of organizations in which the Subcommittee was interested, on the evening of that same day Thadeus Scott, Commonwealth Detective, delivered to Brick in his motel photocopies of some of the seized documents. On the following morning, 9 October 1967, Brick was taken to the Pike County Court House, where he examined the seized items for about one hour.[22] These were located in the walk-in vault in the Commonwealth Attorney's office (Ratliff's office), where Ratliff had been instructed by the United States District Court to keep the material.[23] Later that day Brick inspected the file of the three-judge court action in the U. S. Court House. On 12 October Brick returned to the vault in Ratliff's office where, again accompanied by Dotson (Assistant Commonwealth Attorney) and Scott, he examined the seized material for about four hours and for the first time took notes. He then returned to Washington, taking with him photocopies of 234 of the documents.[24]

States v. *McSurely*, No. 24,812 and 24,813, (D.D.C. 1970), (D.A. 401 and 402). *Rvsd. and Rmnd.*, 473 F.2d 1178 (D.C. Cir. 1972). In the Kentucky three-judge court case plaintiffs stipulated that Duffy had no contact with Ratliff until this telephone call. Stip. 3, App. 20. In an affidavit attached to the defendants' motion for dismissal or summary judgment, Senator McClellan flatly denied any participation of any sort in the search and seizure of 11 August by the Kentucky authorities.

[22] Stip. 9, App. 20-21.

[23] *United States* v. *McSurely*, *supra*, note 21, D.A. 403-04.

[24] Stip. 12, App. 21.

A very important event took place before Commonwealth Attorney Ratliff permitted even the Senate investigator access to the documents. Ratliff testified,

> Before that was done, however, I made strenuous efforts to contact one or all of the three judges, and I couldn't find Judge Combs. I couldn't find Judge Gordon, and I want to say, Sir, with certainty that I believe that it was at this point that I did talk with Judge Moynahan. I found him, I think, at his mother's . . . . There was no secret as to what happened. I was very open about it and it was a Senate investigator and he identified himself with the credentials and he took none of the material. None of the material was taken other than the copies that he used.[25]

As to what happened when he talked with Judge Moynahan, Ratliff further testified,

> Q. Did you permit your assistants to permit Mr. Brick of the McClellan committee to examine and photograph this material after you had represented to the Court that you would keep it inviolate as the custodian with the United States Marshal? . . .
>
> A. The answer is that I assume that he did see the material, Mr. Combs. I was not present. *I had my permission* and I gave members of my staff permission to do that on the condition that none of it be removed.[26]
>
> . . .
>
> Q. Did you not contact your custodian, the U.S. Marshal, to see if he would agree that Mr. Brick may examine and photograph the material?
>
> A. No, Sir, *I contacted the federal bench.*[27]

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[25] *United States* v. *McSurely*, D.A. 406.

[26] *Id.*, D.A. 407 (emphasis added).

[27] *Id.*, D.A. 408 (emphasis added). The testimony about this conversation has, as noted, been taken from the court record in another proceeding. Our conclusion about the nature of the custody orders in this case does not rest solely on this testi-

On 16 October, at the direction of Senator McClellan, Chairman of the Subcommittee, Brick prepared subpoenas for the original McSurely documents still in Ratliff's possession which the Senator had determined would be of value to the Subcommittee's investigation. On the following day, Brick was in Kentucky and informed Judge Moynahan by telephone of the subpoenas prior to service on Ratliff, Kraft, (the U.S. Marshal) and the McSurelys.[28] On 18 October plaintiffs filed motions with the three-judge U.S. District Court seeking orders blocking Ratliff from releasing the seized material to the Subcommittee and directing him to return those materials to the McSurelys.

The action of the three-judge U.S. District Court on this effort of the McSurelys to obtain the release of their documents and to bar Subcommittee access to them was unequivocal. On 30 October 1967 the court issued an order, the complete text of which is:

> *The motion* of the plaintiffs, Alan McSurely, Margaret McSurely, and Joseph Mulloy, *that the materials now in the custody of the Commonwealth Attorney of Pike County be returned to them at this time is overruled.*
>
> The motion of plaintiffs for a restraining order enjoining defendants from releasing such of the materials as are desired by a Committee of the United States Senate is overruled.
>
> *The parties* to this action and the officers of this Court *are directed to cooperate with the Senate Committee in making available such of the materials, or*

mony, however, but is based instead on the uncontroverted facts of this case, *e.g.*, the language of the order of 30 October 1967. We have quoted from this testimony only as a further, cumulative demonstration that the three-judge court never meant its custody order to be a secrecy order.

[28] Stip. 13, App. 21.

> *copies thereof, as the Committee considers pertinent to its inquiry;* but until time for appeal is expired, this will be done in such manner as to keep intact those materials that may be pertinent to the appeal of this case. (emphasis added).

On 1 November the court denied plaintiffs' motion for rehearing and reconsideration of the 30 October order, but granted a twenty-four hour stay in order that plaintiffs could apply to the Supreme Court for review of the District Court's order. Pending this Supreme Court review the District Court further ordered "that the material in question shall not be removed from the custody of the Commonwealth Attorney of Pike County, Kentucky, and copies thereof shall not be made on or before 2:00 p.m. Eastern Standard Time, November 2, 1967."

The history of that Supreme Court application[29] is referred to in the final order of the U.S. District Court of 13 December 1967, which recites,

> On November 10, 1967, Mr. Justice Stewart, for the Supreme Court, granted an emergency relief to the extent that the *documents in issue remain in their then custody* until this Three-Judge Court might hear and rule upon the factual and legal objections of the plaintiffs to the validity of a subpoena duces tecum of the Senate Committee.
>
> Whereupon, on December 5, 1967, this matter came on for hearing on said objections before this Three-Judge Court. . . . IT IS HEREBY ORDERED that the objections of the plaintiffs to the subpoena duces tecum of the Senate Committee be and the same are hereby overruled, AND IT IS FURTHER ORDERED that the defendant Ratliff, Commonwealth's Attorney, Pike County, Kentucky, be and he is hereby ordered and directed, subject to the hereinafter stay provisions of this order, *to comply with the subpoena*

[29] See 389 U.S. 949 (1967).

duces tecum of the Senate Committee by allowing said Committee representatives to photograph copies of any of the desired books, papers, documents and other materials now in his possession under order of this Court. . . . (emphasis added).

A stay of five days before Ratliff should comply with the Senate subpoena duces tecum was granted to allow plaintiffs to apply to the Supreme Court again.

On 20 January 1968 the Supreme Court, again per Justice Stewart, stayed the order of the three-judge court "to the extent that the seized documents shall remain in custody," [30] but conditioned the stay upon the filing of an appeal to the Supreme Court. (The order being appealed was the order of 30 October, not the order of 14 September). The McSurleys thereafter submitted their jurisdictional statement and the Solicitor General responded. On 18 March 1968 the entire Court declined to hear the case, and dismissed the appeal with a *per curiam* order.[31] The stay was continued, however, for another thirty days so that the McSurelys could apply to the Sixth Circuit for a stay.

By the time their appeal to the Sixth Circuit was taken, the question of custody of the documents was in a different posture, as time for appeal from a three-judge court (order of 14 September) to the Supreme Court had expired, a distinction the Sixth Circuit was careful to make. All of the actions of the three-judge court after the order of 11 September through that of 13 December 1967 had been taken before time for appeal, first by Kentucky and then by the McSurelys, to the Supreme Court had expired.[32] The Sixth Circuit

[30] 390 U.S. 914 (1968).

[31] 390 U.S. 412 (1968).

[32] "After the decision of the [three-judge] District Court *and before the time for appeal had expired*, subpoenas duces tecum ordering production of certain of the seized documents were issued [16 October 1967] by the Permanent Subcommittee . . . ." 398 F.2d 817 (1968).

was now acting in a different setting. "The single issue *now* before this court is whether the District Court erred in refusing to return to their owners documents which were seized in aid of a prosecution under an unconstitutional statute, *now that the time for appeal has expired.* . . . The right of the court to retain possession of the seized documents, which include no contraband, has expired." [33] The Sixth Circuit thus ordered in July 1968 that the documents be returned to the McSurelys, but without prejudice to the right of the Subcommittee to proceed with the enforcement of its subpoenas.[34] The District Court thereupon directed Ratliff to return all of the seized materials, including all copies, which he did on 8 November 1968.[35] Upon receipt of these materials the McSurelys were immediately served with new Subcommittee subpoenas similar to the original ones.[36]

[33] 398 F.2d at 818 (emphasis supplied).

[34] 398 F.2d at 818: "[Q]uestions [as to the subpoenas] may be adjudicated under the appropriate procedure for challenging subpoenas of Congressional Committees."

[35] Brick had returned copies of the 234 documents which Brick had taken with him to Washington to Scott, Commonwealth Detective, on 14 August 1968. Senator McClellan so stated in a Committee Hearing, App. 69. Brick so testified in the contempt prosecution, D.A. 730.

[36] The McSurelys refused to comply, which gave rise to a prosecution for criminal contempt, conviction for which was ultimately reversed by this court. *United States* v. *McSurely*, 473 F.2d 1178 (1972). The writer of this opinion concurred only in the result reached therein by the majority. Arguing that application of the exclusionary rule to legislative hearings was wholly inappropriate, he voted to reverse the McSurelys' conviction, not because the subpoenas in question were based upon information obtained in an unlawful search, but because the Government had failed to make the necessary

II. *The Existence of a Search and Seizure—Actions of the Three-Judge District Court as They Bear on the Alleged Violation of the Custody Order*

The six orders and one opinion of the three-judge United States District Court and the opinion of the Sixth Circuit at no time expressed disapproval of the Kentucky officials' actions in cooperating with the Senate investigators. The recital of the language of the District Court's orders in itself should be convincing that what Ratliff did in furnishing Brick the copies of the documents in his custody was thoroughly approved by that court. There is not one word in the language of the six orders, before or after Brick's inspection and copying of the documents in October 1967, which indicates that this was in the view of those judges in any way unauthorized or improper.

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showing that all of the subpoenas' demands were pertinent to the Subcommittee's legitimate inquiry. 154 U.S. App. D.C. at 157-67, 473 F.2d at 1194-1204. The writer did *not* accept the panel majority's characterizations of Brick's actions as a "search." . . . "Second, although Brick's examination of the McSurelys' documents may be characterized as an illegal subcommittee action, passive reception of illegally seized information from others cannot even properly be termed a 'search.'" . . . "Third, if Brick's examination of the documents can be termed a search, the inspection by one law enforcement agency of documents in the custody of another might, by extrapolation, also be characterized as a search—possible illegal if the custodian agency's original seizure was held unlawful. The exclusionary rule now makes any descriptive nomenclature of the sampling of items on the tarnished 'silver platter' irrelevant with regard to admission of evidence in a criminal case, the evidence is barred in court without consideration of whether what the federal officers did was a search or not. However, troublesome questions would arise concerning the personal liability of law enforcement officers if a second 'search' were recognized in those circumstances." (473 F.2d at 1202).

In addition to the language of the court in its orders, we have the testimony of Ratliff that before permitting Brick's inspection of the documents he "did talk to Judge Moynahan," that "I had my permission and I gave members of my staff permission [to permit Brick to examine and receive photocopies of the material]," and "I contacted the federal bench."

A.

Examining the orders more in detail, the order of the three-judge District Court on 14 September, making Ratliff's possession of the documents "custody" "in safe keeping" for the federal court, was a *preservation* order, *not* a *secrecy* order. The purpose of the court order was to preserve the documents for the use of whoever might eventually have a rightful interest in their use. On 14 September that party which might have such rightful interest was the Commonwealth of Kentucky, and the anticipated use was in a state prosecution against the McSurelys brought by indictment on 11 September.

The majority agree with us in our characterization of this critical order as simply a preservation order. "[*T*]*he purpose* of the 'safekeeping' order of the three-judge court *was to preserve the seized items* both for the McSurelys' benefit and for the orderly administration of the judicial process through 'appeal or otherwise,' . . ." [37] Again, "*The court* did not return the seized materials to their owners because it *sought to preserve the existence of the res* in event of appeal to, or reversal by, the Supreme Court." [38] In the majority's characterization of the court's order, as in the court's order itself, there is no hint of secrecy, nor a suggestion that the preservation was exclusively for the benefit of the McSurelys.

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[37] Majority op. at 28 (emphasis supplied.)

[38] Majority op. at 28 (emphasis supplied.)

If preservation was the "limited purpose," [39] *how could "Brick's investigative activity outside of the channels established by the court violate[d] its order"?* [40] *The documents were preserved in their entirety. Brick never did anything but inspect, make notes on, and receive photocopies thereof.* It seems logically inescapable to us that for Brick's investigative activity to have violated the court's order—which the three-judge court itself never indicated that it did [41]—the order must be construed as a *secrecy* order, which is impossible from the very language of this and later orders,[42] and even the majority opinion makes no claim that the order of 14 September was other than a preservation order.

In the supplement to its opinion the majority does argue, however, that what the orders really meant was that Ratliff had to receive "court approval" before granting access to anyone.[43] Nowhere does the majority seek to base its interpretation upon the language of any of the orders, but it relies instead upon their "context." [44]

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[39] Maj. op. at 29.

[40] Majority op. at 28.

[41] Even if it be now construed as a secrecy order, Brick's "violation" could properly be termed only a contempt of that court (not this court), and not at all a search and seizure within the meaning of all precedents under the Fourth Amendment, as we make clear in II. B. *infra*.

[42] The McSurelys themselves in their amended complaint in this very law suit, Paragraph 17, reveal that they recognize that the 14 September 1967 order of the three-judge court was not what the plaintiffs sought. "It did not, however, give immediate relief as to the documents which had been seized under the statute. It ordered instead that the documents and other seized material be kept in the custody of the defendant Ratliff 'to be held by him in safekeeping' pending a possible appeal by the defendant Ratliff *et al.*" App. 43.

[43] Maj. Op. (Supplement) at 46.

[44] *Id.* at 49.

The custody order of 18 October was issued in connection with an injunction against a state sedition prosecution which was "instituted, at least in part, in order to stop [the McSurelys'] organizing activities." [45] If Ratliff had allowed access to other prosecutors who would seek to "chill" their activities with similar charges, then perhaps he would have acted at variance with the spirit of the custody orders. But it is a distinct jump from that to cooperation with a United States Senate Subcommittee that was directed to investigate the causes of civil unrest in the country. Where the language of the orders put no express conditions on Ratliff beyond the preservation of the *res*, it would be a real strain of the context to find a secrecy provision as against a Congressional investigator.

It is significant that the three-judge court did by the terms of its 1 November 1967 order provide that "copies thereof shall not be made before 2 p.m." on the following day, in order to give the McSurelys time to seek a Supreme Court writ. This is the only language we can find in any of the six orders of the three-judge court which in any way implies either confidentiality or a preservation of the documents for the principal benefit of the McSurelys. In other words, when the three-judge court wanted to do more than simply to preserve the documents in safekeeping, it said so explicitly by restricting the copying of the documents, but it did *not* impose any such restriction, and then for only a period of 24 hours, until seven weeks after its order of 14 September and three weeks after Brick had inspected and made copies of the documents.

No document directed by the Court to be held in custody was transferred to Brick. Every piece of paper was still there when Brick left Pikeville. Where was the violation? Where was the seizure?

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[45] 282 F. Supp. 848, 852 (E.D. Ky. 1967).

B.

It is highly significant that the federal court order of 14 September did not prohibit Ratliff or his aides from examining the documents for any purposes the Commonwealth of Kentucky might have had. Neither this order nor any subsequent order ever recognized any alleged privacy interest of the McSurleys by restricting access to the documents.[46] When the Senate investigative (Duffy and

[46] For example, would the court custody order have barred any examination of the material by outside parties to determine if it included contraband? It is an established principle that, "[t]he mere fact of the illegal seizure, standing alone, does not immunize the goods from forfeiture." *Bacall Imports, Ltd.* v. *United States*, 412 F.2d 586, 588 (9th Cir. 1969). See also *United States* v. *Jeffers*, 342 U.S. 48, 54 (1951). Indeed, such is the implication of the opinion of the Sixth Circuit, in ordering the return of the documents to the McSurelys, when it noted that the materials, "include[d] no contraband." 398 F.2d at 818. If, in the course of compiling an inventory, Ratliff had due reason to believe some material was contraband, he surely would have been entitled, without court permission, to call in outside parties to look at the suspect materials, *e.g.*, to test whether bags of powder were narcotics.

"If the property is subject to forfeiture, appropriate proceedings should be started expeditiously." *United States* v. *Wilson*, No. 75-1713 (D.C. Cir. 28 June 1976) (slip op. at 9). Given the state interest, then, in the speedy identification of contraband, it is unlikely that a custody order, by its silence, means to preclude reasonable inspection of seized goods by outside parties for this purpose. Imagine hypothetically that a Secret Service agent, in the same circumstances that involved Brick, had copied and inspected currency taken from the McSurelys in order to determine if it was counterfeit money subject to forfeiture under federal law, 18 U.S.C. § 492. Does the majority contend that such action by the Secret Service agent would constitute a "search" on his part in violation of the court orders? The Senate of the United States surely has rights equal to those of a federal investigative agency.

Brick) came on the scene, it was obvious that they also had a legitimate interest in examining the documents for the Senate's purpose.

While the order of the U.S. court on 14 September did not specifically direct Ratliff to make copies available to the Senate Subcommittee, yet there is nothing in that or the two previous orders which prohibits him from doing so, as there was in the 1 November order. Of course, as of 14 September the Senate Committee's interest had not come into the picture, so there was no need for the 14 September order (or any previous order) to speak to this issue.

When the issue of the Senate Subcommittee's use of the documents did arise, by the Senate investigator Brick contacting Commonwealth Attorney Ratliff, who in turn contacted U.S. District Judge Moynahan, it is evident that Ratliff only granted access to the documents to Brick after he "contacted the federal bench," after "I had my permission." But this informal contact is not why we disagree so strongly with the majority here. The majority position rests entirely on the conclusion that Brick's inspection of the documents in Ratliff's possession was totally "unauthorized" and therefore illegal because Ratliff held as custodian for a federal court. *The short but complete answer is that there was never any need for the court formally to authorize inspection, because the court by its orders had never forbidden, nor did it intend to forbid, any such inspection.*

Thus the three-judge court did not view the Senate subpoena as the fruit of any "poisonous tree," although it was and is, of course, undeniable that the Senate subpoenas came directly from Brick's inspection of the original documents in Ratliff's possession and the 234 copies Brick took back to Senator McClellan. This is borne out by the first opportunity which the court had to speak to this issue, when the McSurelys moved on 18 October to

enjoin Ratliff and other defendants from releasing the documents to the Committee. The three-judge court then ruled—emphatically against the McSurelys—in favor of continued Committee access to the documents. The language in the order of 30 October (as well as in the final order of 13 December, after the matter had gone to Mr. Justice Stewart) shows that what Ratliff had done with the Senate investigator was exactly what the court wanted him to do and to continue to do.

The majority responds that the dissent "makes [too] much" of the October and December orders on the ground that "[i]t does not even appear that Brick's pre-subpoena investigation and transportation of copies of the seized documents had been raised as an objection to the subpoena." [47] What the majority cannot deny, however, is that the pre-subpoena activity of Brick had been fairly and fully set out for the court. In its order of 13 December the three-judge court stated that at the hearing of 5 December, "[t]he interested parties plaintiff and defendant jointly tendered to this Court by stipulation or exhibit all evidentiary facts desired by them to be introduced upon the question . . . ." It is in the stipulations of 5 December, of course, that the pre-subpoena activity of Brick is extensively described.[48] The revelation of this activity, however, did not dissuade the 3-judge court from its renewed order that Ratliff cooperate with the Senate Subcommittee.

In fact, it is quite apparent that the Senate subpoena made no difference in the way the court viewed what its custodian, Ratliff, should do in assisting the Senate investigator. While the majority hangs its entire theory

[47] Maj. Op. (Supplement) at 50 (footnote omitted).

[48] See Maj. Op. at 6 n. 7. Nine of the fifteen narrative paragraphs of the stipulation concern the activities of Brick from his arrival in Kentucky to his pre-subpoena return to Washington.

of liability to the McSurelys on the ground that Brick had neither a court order (discussed above) nor a Senate subpoena when he first inspected and took copies of the documents, yet the three-judge court in its 30 October order (quoted in its entirety at pages 11-12 *supra*) *never once mentioned the subpoena.*[49] So it is unquestioned that, in the eyes of the court which the majority emphasizes did have custody of the documents, neither a court order nor a Senate subpoena was necessary to authorize Ratliff to furnish copies to Brick.

C.

Completely consistent with this, it is noteworthy that the Sixth Circuit in its opinion [50] nowhere expressed any disapproval of the three-judge District Court's actions in making the documents available while appeal to the Supreme Court was pending and the documents were properly in the District Court's custody and in Ratliff's immediate possession. It was only after time for appeal to the Supreme Court had expired that the Sixth Circuit ordered return to the McSurelys, with the proviso that the Senate Subcommittee could then serve them with its subpoena, which it did simultaneously with the return of the documents.[51] The District Court, having completed its

[49] Looking at the text of the 30 October order, if Brick had returned *without* subpoena, it is apparent that Ratliff would have no choice but to permit Brick to inspect and copy the documents.

[50] 398 F.2d 817 (6th Cir. 1968).

[51] As to by whom and for what purpose the documents were being held by Ratliff, the Sixth Circuit described it thus, "The District Court directed [14 September 1967] that the seized documents be retained in the possession of the Commonwealth attorney for safekeeping until final disposition of the case by appeal or otherwise." 398 F.2d 817. And later, "The District Court denied [13 December 1967] this motion and ordered the parties to the action and officers of the court to cooperate

business, had no right to retain the documents and was thus ordered to return them to their owners, the McSurelys. But the right of the McSurelys, either to obtain the documents or to prevent the Senate from looking at the documents or making copies of them, did not exist until the time for appeal had expired.

Taking this as the true posture of the case, it is inconceivable that a committee of the United States Senate could be frustrated in its objective of securing documentary evidence relevant to its lawful inquiry for a legislative purpose, by the documents being withheld from even a view by its investigator, on the ground that the documents were held in "custody," "in safe keeping," by order of the United States court pending the "final disposition of the case by appeal or otherwise." The Senate Subcommittee wanted the documents in October 1967, not after the federal case had completed its journey through the federal judicial system.

If it be objected that the proper route was for the Senate Subcommittee to issue a subpoena for the documents (as was ultimately done on 16 October 1967), we suggest that it is much more reasonable, and the method which we would expect a Senate committee to follow in conducting its business, to send an investigator to look over the documents then in the custody of the United States court to determine their relevance before issuing

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with the Senate Committee in making available such material, or copies thereof, as the Committee considers pertinent to the inquiry, but in a manner to *keep the materials intact for use in the event of appeal.*" 398 F.2d 818. (Emphasis supplied.) The Sixth Circuit characterization of the possession of the documents by Commonwealth Attorney Ratliff is completely consistent with the language of the three-judge District Court's orders, both before and after Brick's inspection of the documents.

a committee subpoena."[53] This is exactly what the Senate Subcommittee and Brick did, and it seems to us entirely reasonable, if it be postulated that the Senate Subcommittee could have had access by lawful process to those documents while the litigation between Kentucky and the McSurelys was continuing. What our colleagues would have the Senate do henceforth is abstain from any intelligent investigation, but issue blanket subpoenas for documents which might possibly be relevant. It appears to us much more sensible to inspect a vast quantity of documents, take photocopies of those the investigator deems possibly relevant to the committee for its appraisal, and then on the committee's own authority have subpoenas issued for the limited number which the committee itself deems relevant. This was exactly what was done in this case.

If it be objected that Brick should have applied for a formal order from the three-judge U.S. District Court, THE DECISIVE ANSWER IS THAT THAT COURT ITSELF DID NOT THINK SO. The court knew the kind of custody it had conferred on the Commonwealth Attorney, for what purpose, and in no order prior to Brick's inspection did it restrict Ratliff's or any one else's access to the documents. When the court learned of the Senate investigator's viewing of the original documents and obtaining copies, as it did from the McSurelys' motion of 18 October and the subsequent hearing, as well as from Ratliff's direct prior conversation with District Judge Moynahan, the court in no way expressed disapproval of such cooperation by the Kentucky and Senate officials in its order of 30 October or later. True, by 30 October the Senate had issued formal subpoenas (to which the District Court did not even refer in its 30 October

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[53] The documents seized by Kentucky warrant were of vastly greater volume than the 234 copies tendered Brick. 282 F. Supp. at 850.

order), but these clearly rested on Brick's prior inspection, which, if it had constituted an "illegal search and seizure," would have caused the three-judge court to have stayed compliance on the "fruit of the poisonous tree" doctrine. Neither did the Sixth Circuit nor Mr. Justice Stewart nor the Supreme Court advert to the Commonwealth Attorney's cooperation with the Senate investigator as constituting any illegality or even any search and seizure.

The truth of the matter is that neither the three-judge U.S. District Court, in construing its own orders, nor the Sixth Circuit nor the Supreme Court in passing on those orders, characterized Brick's inspection of the documents in Ratliff's "custody" "in safe keeping" for the District Court as a "search and seizure," much less an "unreasonable search and seizure." From September through December 1967 the U.S. District Court was dealing with the issues with an intimate knowledge of all the facts immediately before it, and certainly with a full awareness of the orders it had issued and the intent behind those orders. It is totally erroneous—and somewhat presumptuous—for the U.S. Court of Appeals for the District of Columbia Circuit in 1976 to hold that what the three-judge U.S. District Court for the Eastern District of Kentucky knowingly and approvingly permitted to be done by a Kentucky official, acting under its own orders, in cooperation with an agent of the U.S. Senate, constituted an "illegal search and seizure."

D.

While the opinion of Senior District Judge Matthews in *United States* v. *McSurely* [53] did conclude that Brick's "unauthorized" inspection was an "unlawful encroachment" upon the Fourth Amendment, the issue remains as to the weight to be accorded to that judgment by

[53] 473 F.2d 1178 (D.C. Cir. 1972). See note 36, *supra*.

this *en banc* court. The majority finds, as it must, that the decision is not res judicata as to the federal appellants but considers it "pertinent" [54] nonetheless, although it fails to tell us how pertinent. We believe, for a number of reasons, that its pertinency at this point is very limited and that it should not detain this court, or the court below on remand, from reaching a contrary judgment.

The 1972 court did not have before it, as this court does now, the full text of all six orders of the three-judge court.[55] These orders, as we have shown, enable a judge to interpret the meaning of the custody order in context. Just as courts attempt to read the meaning of a term or a provision in light of the statute that contains it, so too a proper understanding of the "safekeeping" order is enhanced by a study of the various restatements of that order and of the surrounding motions and orders. Perhaps Judge Matthews assumed that the order was meant to provide for strict secrecy in addition to preservation, like the one-day order of 2 November that differed from all the rest in its ban on copying. An examination of all the orders would have refuted that assumption. In any event, the 1972 majority did not articulate the view of the custody order that underlay its conclusion. Whether its conclusion would have been different with access to all the orders is a possibility that is also "pertinent" here.

The unexplained judgment of the 1972 majority may be explainable, in part, because its view of Brick's "search" was unnecessary to its result. Even if Brick had received formal court permission for his search, the subpoenas that ensued would still have been excluded,

[54] Maj. op. at 24.

[55] The only order from the three-judge court in the 1972 record was the order of 14 September. See 473 F.2d at 1190 n. 40. The other orders were supplied to us at the request of this court after argument *en banc*.

under the reasoning of the majority's full application of the exclusionary rule to Congressional committees, as the fruit of Ratliff's original search and seizure. Not only was the 1972 conclusion dictum, but it was dictum that did not have the benefit of the decision in *Calandra*, about the consequences of post search transfer. Nor could it consider the import of cases like *Sherwin*, about what constitutes a search at all.[56] In short, the conclusions of the 1972 majority, found to be of some unspecified weight by the majority here, should in no way impair our own *de novo* determination of the issue now.

III. The Existence of a Search and Seizure—The Senate Investigator's Actions in Viewing the Documents and Taking Copies Thereof

Most simply and basically we are unable to see that Brick's action in inspecting the documents in the possession of Ratliff constituted an "unreasonable search and seizure," or even a "search and seizure."

A.

When the documents left the possession of the McSurelys on 11 August 1967 any expectation of privacy in those documents vanished. Even though the taking by Kentucky authorities was ultimately held to be invalid, because the statute on which the search warrant and prosecution were based was declared unconstitutional,

[56] In support of its finding of a "search and seizure," the 1972 majority cited, as its single reference, *Alderman* v. *United States*, 394 U.S. 165, 171, 203 (1969). See 473 F.2d at 1191 n. 43. *Alderman* holds, on the pages listed, that surreptitious electronic surveillance—"the uninvited ear"—violates the Fourth Amendment. But in *Alderman* the police "bugging" constituted the *initial* invasion of privacy, like Ratliff's raid here. There is no indication that the *Alderman* Court believed that any subsequent inspection of the fruits of the surveillance by an agent from another jurisdiction would be an independent Fourth Amendment wrong. The 1972 majority was thus without precedent in assuming that the inspection of fruits of an illegal search itself amounts to a search.

this did not make the Commonwealth Attorney's possession, during any time he held the documents, the possession of or for the McSurelys. From 11 August until the U.S. District Court's order of 11 September Ratliff held possession as Commonwealth Attorney by virtue of executed Kentucky judicial process. The McSurelys had no expectation of privacy in or right of access to those documents. Ratliff was free to read, copy, distribute copies, grant access to the documents as he willed, limited only by his responsibilities as a Kentucky prosecutor. After the court order of 11 September, which directed that the documents "shall be kept in the custody of the defendant, Thomas B. Ratliff, and the same shall be made available to the United States Marshal," and the order of 14 September, which directed that "material now in the custody of the Commonwealth Attorney . . . continue to be held by him in safe keeping until final disposition of this case . . . ," Ratliff held custody for the U.S. District Court.

But the efforts of the McSurelys to have the critical documents restored to them or to have Ratliff limited in his use had been rebuffed.[57] There is not one word in any of the District Court's orders which recognizes any right or interest of the McSurelys other than perhaps to have the documents restored to them, and the time and occurrence of that event was to be entirely dependent on the outcome of the litigation. *Nor is there a single word in the court orders which purports to change what Ratliff could do with the documents.* At most, there is inferable from the context of the custody orders a prohibition on the distribution to other prosecutors who would seek to

[57] See note 42, *supra*.

"chill" the McSurleys' activities with similar charges. See *supra* at 17-18. Otherwise, his access to or use of the documents, the access of his aides and the access of anyone who Ratliff deemed had a legitimate interest in the documents was not limited by the court orders. His custody became, for at least a time, custody on behalf of the U.S. court rather than the State of Kentucky, and he was instructed to hold the material "in safe keeping."

So when Brick arrived in Ratliff's office in Pikeville on 8 October, the documents were reposing in the vault in Ratliff's office in the County Courthouse. The McSurelys had failed in all their legal efforts to regain possession of their papers, except those Ratliff had deemed not material to his investigation.[58] Ratliff's custody was for the U.S. District Court, a part of the United States government, and perhaps ultimately again to be for the State of Kentucky. The investigator for the U.S. Senate approached the lawful custodian of the documents, satisfied the custodian of his credentials and his authorized purpose from the Senate,[59] and was then permitted to examine and copy some of the documents.

Where and when was the "search and seizure"? If an investigator for the U.S. Senate, or any other branch of the federal government, desires to see and does see documents in the custody of a U.S. district court under absolutely no restrictions except "safe keeping," preparatory to determining for which documents, if any, to issue a formal subpoena, does this act of inspection and copying constitute a "search and seizure" under the Fourth Amendment?

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[58] U.S. District Court order of 11 September 1967, final paragraph.

[59] Since Ratliff's custody was for the U.S. court, he took the precaution of consulting District Judge Moynahan. See text at notes 25-27, *supra*.

B.

The majority of this court holds that it does, that such action by Brick was a "search and seizure" and unconstitutional. Aside from the sheer illogic of their rationale evident from the undisputed factual situation, our colleagues' position cannot be reconciled with the Supreme Court's recent landmark decision in *United States* v. *Calandra*.[60]

In *Calandra* the Supreme Court held that nothing in the Fourth Amendment barred a grand jury from subpoenaing Calandra in order to question him based on evidence admittedly illegally seized during a search of his place of business. The Court made clear that the grand jury was not empowered itself to violate an individual's constitutional rights,[61] but rejected the argument made in this connection that a grand jury's questions based upon unlawfully seized evidence themselves constituted an independent violation of Calandra's Fourth Amendment rights.[62]

"The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual's life. *That wrong, committed in this case, is fully accomplished by the original search without probable cause.* Grand jury questions based on evidence obtained thereby involve no independent governmental invasion of one's person, house, papers, or effects, but rather the usual abridgment of personal privacy common to all grand jury questioning. Questions based on illegally obtained evidence are only a derivative

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[60] 414 U.S. 338 (1974).

[61] *Id.* at 346.

[62] *Id.* at 354.

use of the product of a past unlawful search and seizure. *They work no new Fourth Amendment wrong.*" [83]

The Supreme Court in *Calandra* did not directly address the issue whether an action for personal damages would lie against the members of a grand jury or its agents for utilizing information derived from an unlawful search and seizure. Nevertheless, the Court's reasoning appears largely to answer the question. In the first place, such an action could not be premised on a violation of the Fourth Amendment, since the Court made clear that the constitutional wrong is fully accomplished by the original unlawful search. Some other basis would have to be found for the suit, such as a statutory or common law invasion of privacy.

It would appear extremely counterproductive, however, on the one hand, to grant a grand jury the right to consider and base questions on materials derived from an unlawful search and, on the other, to expose the members of the grand jury or their agents to personal liability for exercising that right. It is impossible for a prosecutor to determine whether certain materials may or may not be useful in a grand jury investigation without examining them beforehand. So long as it appears that the information may be relevant to the grand jury's task, it is implicit in the Court's decision that this activity is within the lawful scope of the prosecutor's duty and, therefore, immune from suit.

In sum, it would appear under *Calandra* that a Congressional committee should enjoy at least the same prerogative as a grand jury to use material which has been unlawfully seized. As with the grand jury, the Congressional committee may not be privileged to utilize such information if its agents have actively participated in the original unlawful seizure. Outside of that cir-

[83] *Ibid.* (emphasis added).

cumstance, however, a committee commits no new Fourth Amendment wrong by examining and copying documents originally unlawfully secured.

The majority argues that Brick's examination of the McSurely materials after the original unlawful seizure was itself violative of the Fourth Amendment because he knew the materials had been unlawfully seized and because a three-judge federal court had ordered Ratliff to hold the materials in safekeeping. Certainly, after *Calandra*, the fact that Brick knew the documents had come wrongfully into Ratliff's possession could not render his own examination unlawful. That a grand jury knows its information springs from an illegal search does not prevent it from examining the fruits of that search, and basing questions thereon, in the pursuit of a lawful investigation. A Congressional committee, as we detailed above, is entitled to the same prerogative—without becoming civilly liable.[84]

That Ratliff had been ordered to hold the materials in safekeeping also does not render Brick's examination violative of the Fourth Amendment. The three-judge court's order was simply a function of its finding that the materials had been unlawfully seized. There was no implication in the order that investigatory committees of a legislative body which would otherwise be entitled

[84] Quoted by the Majority op. at 33 n. 62, *Calandra* noted the availability of "damages against the officers who conducted the unlawful search." In no way should this simple reminder of *Bivens* (a citation in the original dropped by the Majority in its quotation) be read as a suggestion that any inspection of the illegally seized evidence in *Calandra* amounted to a violation of the Fourth Amendment. *Calandra* had already stated with full explicitness, see quotation *supra* at 29, that the unconstitutional invasion of privacy had been "fully accomplished by the original search." The reminder of *Bivens* is clearly directed at the original search and not at any subsequent inspection by the grand jury or prosecutor.

to utilize unlawfully seized materials were barred from such utilization by the court's formal ruling. This does not mean Brick could have broken into Ratliff's office to obtain access to the materials. Such an entry would have been in violation of *Ratliff's* Fourth Amendment rights. Ratliff himself, however, invited the Subcommittee to come to Pikeville to examine the materials. He alerted the Subcommittee to the fact that the product of his search of the McSurleys' home might be relevant to its investigation.

Calandra makes clear that a grand jury or, we submit, a Congressional committee has the right in its investigatory capacity to use the product of a past unlawful search and seizure. The Supreme Court emphasized that such use works no new Fourth Amendment wrong on the owners of the seized property. Since effective utilization of materials requires their examination, it is difficult to conceive, after *Calandra*, how the inspection by one authorized government agent of documents in the custody of another can be characterized as an unconstitutional search. The constitutional violation is completed with the original taking.[65]

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[65] As support for its view that we should hold that Brick's examination of the materials in Ratliff's custody was an unlawful search, the majority cites language in the writer's concurring opinion in *McSurely* to the effect that Ratliff's consent would not operate to "legalize this 'search.'" The majority also notes that I never concluded there that Brick's actions were constitutional. The word "search" was in quotes in this writer's opinion, however, because I did *not* consider it as such. Nevertheless, the issue of the proper legal characterization of Brick's acts appeared difficult at the time, and I felt no need to decide it. The Supreme Court's later landmark decision in *Calandra* provides solid support for our position that an authorized investigatory body which examines and utilizes the fruit of an unlawful search and seizure—with the cooperation of the custodian—commits no Fourth Amendment violation.

C.

The majority attempts to distinguish *Calandra* from the case at bar by saying: ". . . the government agent who authorized delivery to the grand jury had taken custody *before* there was any judicial determination of illegality or ruling restricting access to the seized materials. Here prior to Subcommittee access a court had intervened and declared the state search and seizure without legal justification. . ."[66] For the majority to attempt to make a distinction between this case and *Calandra* on the basis of the *timing* of the judicial determination of illegality is startling, because the timing of the judicial determination in *Calandra* was precisely the same as in the case at bar.

In *Calandra* the "government agent who authorized delivery to the grand jury" is in the position comparable to Commonwealth Attorney Ratliff here. Both "had taken custody *before* there was any judicial determination of illegality." The Grand Jury in *Calandra* is in the same position as Brick and the Senate Committee in the case at bar. Neither used the illegally seized material until *after* the judicial determination of illegality.

Thus, *Calandra*, directly contrary to what the majority claims, in regard to the time element of the judicial determination, is exactly like the relationship of Ratliff, the federal court, and Brick here. Brick did not use, *i.e.*, inspect, make notes on, and copy the documents until after the federal court had ruled they had been illegally seized. In *Calandra* the grand jury did not use the illegally seized evidence, *i.e.*, put questions to the witnesses based on the inspection, until *after* the judicial determination of illegality. If the trial court in *Calandra* had done what the Supreme Court later said it should have done, it would have found the illegality of the

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[66] Maj. op. 32-33.

search, ordered the evidence suppressed but then allowed the grand jury to ask questions based on it."

" The majority disputes the similarity of the timing by contending that the grand jury in *Calandra* used the seized evidence *before* the determination of illegality, Maj. Op. (Supplement) at 47 n. 80. It is not clear, first of all, that this alleged use by the grand jury ever took place, and, even, if it did, *this is not the event that is the subject of the Supreme Court opinion, to which we make our comparison.*

The first step in *Calandra* was the seizure of the documents pursuant to a search warrant in December 1970. The first step in *McSurely* was the seizure of the documents by a search warrant by the state in August 1967.

The second step in *Calandra*, according to the majority, was the use of the documents by the grand jury prior to the determination of illegality in October 1971. The majority only infers this use from the text of the subpoena, issued before the finding of illegality, which sought to ask Calandra questions "based on the evidence seized." After a search through the Supreme Court opinion, *supra*, as well as those of the lower courts, 332 F. Supp. 737 (N.D. Ohio 1971) and 465 F.2d 1218 (6th Cir. 1971), it is not clear that the second step occurred at all, *i.e.*, there is no indication that the prosecutor, who framed the subpoena, ever showed the documents to the grand jury prior to October. The *second step* in *Calandra, which was the subject of the Supreme Court opinion, was the questioning of Calandra before the grand jury*, with the prosecutor probably asking the questions, based on knowledge gained from the seized documents. The second step in *McSurely*, to which comparison must be made to *Calandra*, was Brick's inspection and note-taking on the documents during a Congressional investigation.

In both *Calandra* and *McSurely* the issue around which the Supreme Court opinion and our opinion revolve is the use of the documents *after* a determination of illegality. In *Calandra*, the Supreme Court permitted the grand jury to ask questions based on documents which had been declared illegally seized. Similarly in *McSurely*, putting aside the question of the interpretation of custody orders, the use of the documents by Brick, after the three-judge court had found the state search

This is exactly what the three-judge court in Kentucky did here. It first judicially determined that the evidence was illegally seized. But thereafter the court permitted the use of that evidence by another investigative agency, *i.e.*, the Senate Subcommittee, just as the trial court in *Calandra* should have permitted the Grand Jury to use that illegally seized evidence.

So, contrary to the reasoning in the majority opinion, comparing *Calandra* directly with this case, it is quite apparent *it makes no difference whatsoever whether the determination of illegality is made before or after the transfer to or use by the second investigative agency.* That transfer is not a search and seizure, and that use is not to be barred, simply because of an originally illegal search and seizure by the first investigative agency, just as was held in *Calandra*. The time of the judicial determination is thus immaterial. The question is in this case whether the inspection, taking notes, and transportation of the copies by Brick, *i.e.*, use, constituted an "unreasonable search and seizure" within the Fourth Amendment. The question of whether it was an unreasonable search and seizure or a second wrong (as phrased in *Calandra*) is, on the facts and rationale of *Calandra*, not in any way decided by whether the judicial determination of illegality came before the use of the material, as it did in *both* this case and *Calandra*.

The majority attempts to distinguish *Calandra* on a second ground: "In Fourth Amendment terms, *Calandra* involved a single search and seizure by federal agents and mere derivative use by the grand jury, whereas two

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illegal, should not be regarded as "a fresh and independent violation of . . . constitutional rights," as *Calandra*, *supra* at 353, also declined to do.

separate independent search and seizures took place here." [68] What the majority is referring to are the comparable facts that in *Calandra* the original illegal search was by federal agents with use after transfer by a United States grand jury, while here the original illegal search was by Kentucky officials with use after transfer by a United States Senate committee and its investigator.[69]

A moments reflection will show that the majority should never have brought the subject up. For years (between *Weeks* v. *United States* [70] (1914) and *Elkins* v. *United States* [71] (1960)) it was held that where the transfer was between two jurisdictions or two sovereigns, and the second jurisdiction played no part in the original illegal search and seizure, then the second jurisdiction received the evidence on a "silver platter" with no taint of illegality. *Calandra* was a *Weeks* situation, federal agents seiz-

[68] Maj. op. 33. The majority tries to attach peculiar significance to the term "derivative use" referring to it as "mere 'derivative use'" (Maj. op. 35) and inferring that it refers to the same sovereign or jurisdiction being involved. Aside from the fact that the two jurisdiction situation has always been thought to be the stronger for allowing use by the second (see text, *supra*), use by the grand jury in *Calandra* or the Senate investigator here is equally "derivative." All the Supreme Court intended by the phrase "derivative use" was to employ a less perjorative term than "fruit of the poisonous tree" to describe the second agency's use of the illegally seized material on which to base questions or to discover other tangible evidence. The majority's employment of the term here is obviously not the same as that of Justice Powell in *Calandra*, *i.e.*, use of the seized documents as original evidence as contrasted with "any question or evidence derived therefrom." 414 U.S. 354-5.

[69] Our position is, of course, that there was no second "search and seizure" in either situation.

[70] 232 U.S. 383 (1914).

[71] 364 U.S. 206 (1960).

ing with a federal grand jury using; this case is an *Elkins* situation, state agents seizing with federal legislative committee and its investigator using. It is obvious that if use can be permitted in a *Weeks* situation, as the Supreme Court did in *Calandra*, use must be permitted in an *Elkins* situation, which is this case.

D.

The result and the language in *Calandra*, ". . . a derivative use of the product of a past unlawful search and seizure . . . work[s] no new Fourth Amendment wrong," [72] was almost inevitable, if the rationale of the "silver platter" doctrine search and seizure cases is examined. In the "silver platter" cases, if there had been a second wrong in the second investigative agency's inspection and taking of the seized material, the combined actions of the two agencies in making the transfer would never have been termed "silver platter." It was precisely because there was *nothing wrong* with the second agency inspecting and taking the seized material that the agency was thought to receive it on a "silver platter."

Mr. Justice Frankfurther coined the phrase [73] and explained it thus: "The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter." [74]

To invalidate the second agency's use of the material as evidence, the courts therefore turned to the defect in the original search and seizure, as in *Elkins* v. *United States*, *supra*, because the transfer to the second agency was *not* a search and seizure, nor was it assailable as

[72] 414 U.S. at 354 (1974).

[73] See *Elkins* v. *United States*, 364 U.S. at 208, n. 2.

[74] *Lustig* v. *United States*, 338 U.S. 74 at 78-79 (1949).

being a wrongful act of any kind. If the second agency's actions in inspecting and taking the material from the first, which is comparable to Brick's inspecting and taking the material from Ratliff here, had been assailable as a wrongful act, it would certainly have been more logical to predicate the exclusion of the seized material on the ground of the wrongful action of the second jurisdiction's own agency, which offered the material as evidence in the courts of that jurisdiction, than it was to predicate the exclusion of the seized material on the ground of the original sin of the first investigative agency, over which the second jurisdiction had no control whatsoever.

Thus when the majority here attempts to label Brick's (U.S. Congress) action in inspecting and receiving the documents illegally seized by Ratliff (Kentucky) as an illegal search or seizure, our colleagues are unthinkingly breaking totally new ground, and in so doing are totally inconsistent with the Supreme Court's rationale in all the Fourth Amendment "silver platter" doctrine cases. Throughout the history of the development of the exclusionary rule, the "silver platter" doctrine exception, and the invalidation of the "silver platter" doctrine in *Elkins*, the inspection and taking of material by the second investigative agency for use in the second jurisdiction has simply never been thought of by the Supreme Court as constituting in itself a second search and seizure.

The very latest Supreme Court decision on the "silver platter" doctrine once again does not consider whether the transfer between sovereigns or jurisdictions constitutes a separate search, the assumption, as always, being that it does not. *In United States* v. *Janis*[75] evidence illegally seized by state police was turned over to federal officials, who sought the admission of the evi-

[75] 44 U.S.L.W. 5303 (6 July 1976).

dence and its fruits in a civil proceeding for a tax assessment. Following a balancing test, the Court declined to extend *Elkins* beyond criminal proceedings and admitted the evidence and its fruits. In *Janis* the transfer occured before an adjudication that the original search was illegal. Nowhere in the Court's opinion, or in the two dissents, was there any suggestion that an intersovereign or interjurisdiction transfer had to occur prior to a judicial finding of illegality in the search for the evidence to be admissible in a subsequent civil proceeding

For the first time the majority here point to this completely customary cooperative exchange of information between different governmental units of different jurisdictions, which has never necessitated the prerequisite of a subpoena or formal court order unless the possessing agency objected to sharing the information, as being in itself an independent second search and seizure or a separate wrongful act. This doctrine comes out of an absolutely clear legal sky, with no precedent to support it, and in direct contradiction to *Calandra*, which says very clearly that there is no second wrong in the use by another investigative agency for another purpose of documents or information originally illegally seized.

Our colleagues are forced into this novel approach because they recognize that we do not here reach the exclusionary rule admissibility of evidence question, which the Court had in *Elkins* and various other Fourth Amendment cases, where there was also a transfer between two different law enforcement jurisdictions. The issue here posed by plaintiffs' claim is entirely as to the right or wrong of the second governmental unit's (Congress') inspection and receipt of documents in the hands of the first (Kentucky or the U.S. Court).[76] Hence

[76] The majority might repeat at this point that Ratliff was the custodian for the U.S. Court, not Kentucky, that Brick violated court orders, and this is the wrong for which the Con-

the majority is forced to concoct an entire new legal theory, *i.e.*, that the acts of the second governmental unit in themselves constituted a new search and seizure or "new Fourth Amendment wrong." So far as our research reveals, this theory has been squarely decided as an issue only once before [11] in the search and seizure cases, for, as pointed out above, the courts from the start eschewed the easier task (if there had in truth been a second independent "new Fourth Amendment wrong") of holding the second agency responsible for its own actions, in favor of

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gressional defendants are liable to the McSurelys. This is the first of three possible theories of liability inherent in the majority opinion. The answer is given in extenso in Parts I and II. A. of this opinion, *i.e.*, the court which issued the order never thought so, and it is rather illogical and a trifle presumptuous for this court nine years later to tell that court it did not know what it meant by its own orders.

The second theory of liability offered somewhat implicitly by the majority is that the original illegal search and seizure by Kentucky barred any use of the documents by the U.S. Congress so long as they were in Ratliff's possession (and even thereafter if the subpoenas were based on the "fruit of the poisonous tree). This theory is answered squarely by *Calandra* (which incidentally would seem to overrule our own court's majority opinion in *United States* v. *McSurely*, 473 F.2d 1178 (1972)).

The third theory of liability, stressed by the majority, is that the Congressional investigator's inspection and taking copies of the documents, with the consent of the lawful custodian, was an illegal act on the Congressional agent's part. This theory is squarely refuted by the entire rationale of the "silver platter" cases, both those upholding and those repudiating the doctrine. See *Lustig* v. *United States*, 338 U.S. 74, 78-79 (1949); *Elkins* v. *United States*, 364 U.S. 206, 208 (1960); *United States* v. *Janis*, 44 U.S.L.W. 5303 (6 July 1976). This theory of an illegal independent second "search and seizure" is specifically considered and repudiated by the Ninth Circuit (en banc 11-2) in *United States* v. *Sherwin*, 539 F.2d 1 (1976). We discuss *Sherwin* fully at note 80 *infra*.

[11] *United States* v. *Sherwin*, note 76, *supra*.

the logically more difficult stratagem of holding it responsible for the first agency's action, of which it may never have had prior knowledge or connection.

Further flaws in the majority's logic are seen if we compare what their rationale means here with the rationale of *Burdeau* v. *McDowell* [12] and in turn compare *Burdeau* v. *McDowell* with the rationale of *United States* v. *Elkins* and the other "silver platter" doctrine cases, either those prior to *Elkins* upholding the use of the material or *Elkins* and cases thereafter. In *Burdeau* v. *McDowell* the Supreme Court held that over the protests of the rightful owner the Government could have access to material in the possession of a person who had stolen the material originally. The thief having obtained the material without any prior knowledge or connivance of the Government, the Government investigators were entitled to take the material, despite the protest of its rightful owners, from the thief by the thief's consent or by the usual legal process. In other words, if we look at the transfer between the first wrongful possessor and the Government investigator, this was to be legally tested by whatever objections the thief could or wished to raise, not by those of the rightful owner. Consent of the thief or ordinary lawful legal process would suffice.

This situation was held to be no different where the first wrongful possessor was not a thief but an investigative agency which had obtained the material by an illegal search and seizure. For many years the courts looked only at the possessory rights of the first investigative agency in determining the propriety of the second governmental jurisdiction's action in inspecting and taking the material; that is, if the first jurisdiction's investigative agency cooperated and willingly transferred that material to the second jurisdiction's investigative

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[12] 256 U.S. 465 (1921).

agency, as was usually the case, no problem arose, just as in the instance of the thief transferring possession to the governmental investigator. The second jurisdiction was therefore said to receive the material on a "silver platter," since there could be no challenge to the validity of this transfer. If there was objection by the first investigative agency holding the material, ordinary legal process, a search warrant or subpoena, would suffice to obtain the material from its possessor, any objections of the original rightful owner notwithstanding.

When the "silver platter" doctrine was invalidated in some state courts and in the federal courts by *Elkins*, this was not done by saying that the action of either the first or second investigative agency in cooperating to effect inspection and tranfer of the originally seized material was wrongful in any way. Such inspection and taking by the second agency was never characterized as a search and seizure, wrongful or otherwise. The "silver platter" doctrine was invalidated by pointing to the originally invalid search and seizure, and maintaining that this original sin carried through and should bar the use of the material as evidence in the courts of the second jurisdiction.

Therefore, analyzing the rationale of the Government's obtaining evidence through a thief's possession as in *Burdeau* v. *McDowell*, or obtaining evidence through illegal search and seizure by a first jurisdiction's investigative agency as in the pre-*Elkins* cases, or by analyzing that rationale of the Supreme Court in *Elkins* and subsequent cases, the inspection and transfer from the first illegal possessor to the second investigative agency has never been though to constitute a search and seizure. If it had ever been thought so, federal courts would simple have characterized it as such and excluded the evidence under the *Weeks* doctrine.

Logically the inspection of material by a second investigative agency has never been called a search and seizure, requiring any type of independent formal authorization of the court, because the authority of an investigative agency to inspect material voluntarily tendered to it is derived from its own charter, *i.e.*, the investigative agency has the right and the duty to receive all kinds of information from any source that is voluntarily offered to it. When it does so, it engages in no search or seizure whatsoever, and needs no independent court authority for so doing. If the possessing agency, whether it acquired the material in question legally or illegally, objects to inspection by or transfer to the second investigative agency, then and then only has the second investigative agency been obliged to resort to legal processes to obtain the desired material.[79] But this necessity of legal process was not to overcome any rights asserted at this stage by those who may have been the rightful owners of the material in question, it was to overcome the rights of the possessor of the material, *i.e.*, the thief in *Burdeau* v. *McDowell* or the first investigative agency as in numerous "silver platter" doctrine cases.

And so it was with Brick here when he came to Ratliff. Brick did not come to engage in a search and seizure, he came to carry out his normal duties as an investigator, and no court in previous Fourth Amendment cases has ever said that, given the willing consent of the custodian of the material in question, Brick should have come with a search warrant or a court order. No inspection or taking by a second investigative jurisdiction has ever been held to require independent formal

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[79] It frequently happens that before presentation in court or to a grand jury the second jurisdiction will get out a formal subpoena to obviate any question of the possessor's authority to transfer the material, but this has nothing to do with the second jurisdiction's right to inspect preliminarily or to receive the material. See *Elkins* v. *United States*, *supra*.

court justification, if the possessor of the material in question is willing to permit the inspection and transfer. Hence the decision in *Calandra*, that "a derivative use of the product of a past unlawful search and seizure . . . work[s] no new Fourth Amendment wrong" was an inevitable logical outgrowth of all prior Fourth Amendment search and seizure decisions, and sustains the Congressional investigator's actions here.

E.

In closing this analysis of whether transfers between consenting parties, as in *Elkins* or *Burdeau*, constitute "searches," we note of particular significance the *en banc* opinion of the Ninth Circuit in *United States* v. *Sherwin*.[80] In this case a manager of a shipping terminal inspected some books from a damaged carton, called the FBI, and turned two of the books over to its possession. The Ninth Circuit held that the FBI agent did not need a search warrant in order to receive the books because, "[a] consensual transfer is by definition not a seizure." [81] The court relied in part upon *Coolidge* v. *New Hampshire*,[82] where a voluntary transfer of evidence by a private party to police officers was held not to be a search and seizure. Other Circuits appear to be in accord with the *Sherwin* position.[83]

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[80] 539 F.2d 1 (1976). The vote was 11-2 on the holding that there was no seizure when the government accepted materials offered to it. The en banc reversed a 2-1 decision. The dissenter there was Judge Moore of the Second Circuit, sitting by designation, who argued that, "The fallacy of the majority opinion lies in the assumption of a seizure." 16 Cr.L. 2314.

[81] *Id.* at 7.

[82] 403 U.S. 443, 488-89 (1971).

[83] *See, e.g., United States* v. *Blanton*, 479 F.2d 327 (5th Cir. 1973).

We note with some surprise our colleagues' argument that "[c]ooperation of a custodian without authority to grant access may obviate use of force, but it does not validate an otherwise unlawful search and seizure." [84] This analysis is totally beside the point and begs the question, as is shown by the facts and legal issue in the cases cited. The "consent search exception" and the question of whether the custodian had authority to grant access has to do with an *original* search by the police. None of the cases involving the authority of the custodian, or whether there was any rightful consent to a search, have any bearing, because the *premise* for all those cases is that there *was* a search, and the issue there is consent or authority. Here the issue is whether there was any search and seizure at all.

The Ninth Circuit *en banc* made this important clarifying distinction in *Sherwin*: "For the purpose of determining if a seizure has taken place, however, only the fact of consent is relevant, not whether it was properly authorized. The appellee's argument is mistaken because it confuses the question of third party consent as a justification for a governmental search with the problem of when the government's acquisition of property constitutes a seizure.

"In the former case, the search concededly falls within the scope of the fourth amendment because it is conducted by government agents.

. . .

"In the latter situation, the question is whether the governmental activity falls within the scope of the fourth amendment at all. *A consensual transfer is by definition not a seizure.*" [85]

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[84] Maj. op. 26 (footnote omitted.)

[85] *Sherwin, supra* at 7.

Explicitly rejected by the Ninth Circuit was a contrary decision of the Eighth Circuit in *United States* v. *Kelly*,[86] with regard to a transfer similar to that in *Sherwin*. The *Kelly* court *assumed*, without discussion, that the FBI "activity" in receiving books constituted a "*seizure*."[87] It then considered whether such a warrantless seizure could be justified under any of the traditional exceptions. Finding none,[88] it posited a violation of the Fourth Amendment and excluded the evidence.

The error in *Kelly*, as *Sherwin* noted,[89] is its unexplained characterization of the voluntary transfer to the FBI as a "seizure." Indeed, the *Kelly* court does not even acknowledge this question as an issue. Where the issue has been expressly considered, as in *Sherwin*,[90] the judicial judgment has been that police receipt of evidence volutarily tendered does not violate the Fourth Amendment.

The reasoning behind these cases applies with full force to transfers between sovereigns or jurisdictions. Where a private party invades the privacy of another to seize his property, then the wrong to that person has already taken place so that the mere government receipt of those goods involves no new invasion of privacy.[91] Where one sovereign or jurisdiction engages in an illegal seizure

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[86] 529 F.2d 1365 (1976).

[87] *Id.* at 1371 (emphasis original).

[88] *Id.* at 1371-73.

[89] *Supra* at 7.

[90] A dissenting opinion was filed in *Sherwin* by Judge Hufstedler, joined by Judge Ely. It reads, "I would affirm because I subscribe to the views well expressed in *United States* v. *Kelly*, (8th Cir. 1976), 529 F.2d 1365." *Id.* at 9.

[91] See *Sherwin*, *supra* at 8 n. 10.

of goods, mere access to those goods allowed to another sovereign or jurisdiction does not work a new violation of the Fourth Amendment, since the invasion of privacy has been completed by the original search.[92] "Once a search is found to have been conducted without state [federal] action, then any invasion of privacy is not the [federal] government's responsibility."[93]

IV. The Senate Investigator's Action In Selecting And Transporting Copies He Allegedly Knew To Be Wholly Unrelated To The Legislative Inquiry.

First we note that this claim of the McSurelys, which our colleagues would remand for further action in the trial court, relates only to Brick, who is now dead. From the very description of the alleged impropriety of Brick's actions, and from the stipulated facts, it is apparent that of the federal appellants Brick alone was responsible for the selection[94] and transportation of the 234 copies of the documents back to Washington. The majority holds that even if Brick did not violate the Fourth Amendment in his "search and seizure," he may have violated the right of privacy of the McSurelys by taking private letters he believed to be irrelevant.[95]

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[92] See discussion of *Calandra*, *supra* at 29.

[93] *Sherwin*, *supra* at 8 n. 10.

[94] When we say alone, we mean that neither Chairman McClellan nor any of his aides had any knowledge of or part in the selection and transportation, as is clear from the agreed facts. It was stipulated that the 234 photocopies of the documents were originally selected by Ratliff or one of his aides and delivered to Brick's motel room on the evening of 8 October 1967, Brick's first day in Pikeville, that Brick himself had no part in their selection, and did not see the originals until the next day. See text at note 22.

[95] Majority Op. 34.

A.

The most simple and complete answer to the majority's position, which does not necessitate evaluating the facts as to relevance or irrelevancy, is to point out the clear law in the Supreme Court that, absent an illegal search and seizure by Brick, the charge of invasion of privacy does not state a cause of action under the Constitution. Since the McSurelys' amended complaint does not allege any invasion of privacy on a statutory or common law basis, this cause of action should be dismissed if there has been no Fourth Amendment offense.

If undertaken without relevance to his official inquiry, Brick's inspection and copying of the private papers of Mrs. McSurely may amount to a cause of action at common law for "intrusion" [96] upon her privacy. McSurelys' amended complaint, however, does not allege any such common law or statutory violation, but alleges rather a violation of the Fifth Amendment, which, of course, protects each person from deprivation by a federal official of life, liberty or property, without due process of law. Presumably, the McSurelys are alleging that Brick impaired the privacy interest that is implicit in the "liberty" protected by due process.

Does the Fifth Amendment provide liability under *Bivens* against federal officers for what amount to common law torts? The Supreme Court appears to have answered that question in the negative in the recent case of *Paul* v. *Davis*.[97] Finding a "classical claim" [98] for common law defamation against a state official, the *Paul* Court refused to allow a cause of action under either § 1983 or the Fourteenth Amendment, provisions it con-

[96] See W. Prosser, The Law of Torts, 807-09 (4th ed. 1971).

[97] 44 U.S.L.W. 4337 (23 March 1976).

[98] *Id.* at 4338.

siders comparable to the Fifth Amendment.[99] The Court clearly rejected the view that the due process clause should "extend . . . a right to be free of injury wherever the State may be characterized as the tortfeasor." [100]

Like the defamation claim in *Paul*, the claim of invasion of privacy here resembles a common law tort and involves the Fifth Amendment only by implication. As in *Paul*, the complaint here "has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded." [101] Such claims should be resolved within the more settled contours of the statutory and common law and, indeed, need not be denied in federal courts of statutory and common law claims properly accompany the constitutional charges.[102]

The *Paul* Court, of course, did not mean to cut back on the substantive aspects of privacy that have already been recognized as implicit in the liberty of due process. But its review of that privacy law shows that Mrs. McSurely's claim does not necessarily reach constitutional status. Privacy, *Paul* agreed,[103] can be invaded in the course of

[99] *Id.* at 4340 n.3.

[100] *Id.* at 4339.

[101] *Ibid.*

[102] Compare *Doe* v. *McMillan*, 412 U.S. 306, 309 (1973): "Petitioners alleged that . . . defendants had violated the petitioners' and their children's statutory, constitutional, and common-law rights to privacy. . . ." For the plaintiffs to add on a common law count at this junction, see Maj. Op. (Supplement) at 8, the McSurelys must not only secure the leave of the District Court to amend but must also maintain their new claim under the doctrine of pendent jurisdiction. Since, as we shall show, the Speech or Debate Clause fully immunizes the transportation of this "arguably relevant" material, nothing would be served by amendment as a common law tort is barred, *a fortiori*, if a constitutional claim is foreclosed.

[103] *Paul* v. *Davis*, *supra* at 4343.

an unreasonable search. But if Brick is found not to have violated the custody order, if a consensual transfer by definition is not a search, then no constitutional invasion ensues. The *Paul* Court also noted that with regard to matters of procreation, education and other areas it named, concern for privacy has led the Court to put "limitations on the State's power to substantively regulate conduct." [104] In this case, the federal officer was not involved in the regulation of conduct, as if he sought to limit the McSurelys' access to birth control or abortion. Rather, his activity involved an intrusion into her past personal life, an offense that may be actionable at state law, but which does not constitute the type of "regula-[tion] [of] conduct" that has been found to violate the constitutional right to privacy.

Our position, in short, is that if Brick is found to have acted without violation of the custody order, and, thus, without violation of the Fourth Amendment, then the claim for invasion of privacy ought to be dismissed, for the claim cannot be brought under the Fifth Amendment. The claim should be dismissed even if we or the trial court consider the personal letters irrelevant, a finding which we shortly shall demonstrate is erroneous. An intrusion into Mrs. McSurely's past private life may violate the common law but is not actionable under the Fifth Amendment. The due process clause does not convert all governmental torts affecting life, liberty or property into actionable violations of the Constitution, so held this year the Supreme Court in *Paul* v. *Davis*.[105]

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[104] *Ibid.*

[105] See *Paul* v. *Davis*, *supra* at 4339. The reasoning of Paul may also warrant a dismissal of claims against the federal appellants arising out of their alleged dissemination of documents outside Congress. Upon remand the trial court may determine that this charge essentially resembles a common law invasion of privacy for "public disclosure of private facts." See W. Prosser, The Law of Torts, 809-12 (4th ed. 1971). Characteristic of such claims is that the damage to the plaintiff is the embarrassment and humiliation that ensues from the disclosures, as in the leading case of *Melvin* v. *Reid*, 112 Cal. App. 285, 297 P. 91 (1931), where the identity of a reformed prostitute was revealed in a motion picture. To the extent that the McSurelys are pursuing essentially a common law claim against a federal officer as tortfeasor, *Paul* v. *Davis* requires a dismissal under the current state of the pleadings. Only if the McSurelys are alleging a "constitutional" tort, *e.g.*, due to some injury to their First Amendment rights, do the current pleadings support a cause of action against the federal appellants. Simply stating the issue without deciding it, it may be that there is a First Amendment violation, actionable for damages, where an unjustified disclosure, see *Gibson* v. *Florida Legislative Comm.*, 372 U.S. 539 (1963), enables third parties to retaliate against persons who have exercised their right to freedom of association, *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 460-63 (1958). But absent a showing by the McSurelys that such a claim for violation of the First Amendment may exist, the trial court ought to follow the reasoning of *Paul* v. *Davis* and dismiss any common law claim that has not been so pleaded.

B.

In evaluating the nature of Brick's action we refer to two statements in the majority opinion: "We have no doubt that information gathering, whether by issuance of subpoenas or field work by a Senator or his staff, is essential to informed deliberation over proposed legislation." [106] "And there was reason for investigative focus on the McSurelys." [107] Brick clearly enjoyed the prerogative—so long as he did not obtain the documents by unlawful means—to bring to Washington copies of all material which might prove useful to the Subcommittee's investigation. The question which the majority wishes to remand for further proceedings arises from Brick's testimony at the McSurely contempt trial that not all of the batch of 234 documents he received from

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[106] Maj. op. 17.

[107] Maj. op. 18.

Ratliff—in the selection of which Brick had played no part—were needed by him for the performance of his duties.[108] Nevertheless, rather than attempt a document-by-document determination of which items might or might not be relevant, he carried all the papers to Washington for the Subcommittee's inspection.

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[108] D.A. 726-39. The *only* such document specified by the McSurelys in their contempt trial or in the instant case is a letter—characterized by the McSurelys as a "love letter"—to Mrs. McSurely. Despite the majority's reference to "letters," "papers," "material," "documents," only one letter, addressed to "Dearest Cucumber" from Drew Pearson, has ever raised an issue here. (That among the 234 items were "some personal letters" creates no presumption that these were irrelevant to the committee's inquiry merely because they were "personal," nor has it been so argued; the argument has been about the one specific letter.) At oral argument before the panel counsel for the McSurelys revealed that this letter, upon whose character they stake so much, was destroyed by Mrs. McSurely (along with the copy Brick had taken to Washington) upon its return to her.

A great deal of the argument of the McSurelys, as well as the position of our colleague, rests upon this one so-called "love letter." Rarely has a single document—which we discovered to be now nonexistent—been mentioned so often in brief and oral argument. Yet the characterization of it as a "love letter" rests solely upon the assertion of Mrs. McSurely through her counsel; the writer is dead, Brick is dead, and according to the affidavits and Brick's testimony the only two living people to have seen it besides Mrs. McSurely are Senator McClellan and Commonwealth Attorney Ratliff.

While the letter may have been as terribly embarrassing as Mrs. McSurely now asserts, it is perhaps not unchivalrous to point out that it was Mrs. McSurely herself who kept the letter around the house where it might have been seen by any prying eye. It is now certain that since she destroyed it, it will never be admitted into evidence, and it is also clear that the world would never have heard of this letter had it not been for the lengthy discussion of it by Mrs. McSurely's own counsel at various stages of this lawsuit.

The question posed here is whether it was incumbent upon Brick either to separate out those papers which were in his judgment clearly not required for the investigation or forfeit his protection under the Speech or Debate clause. Ordinarily, as the majority acknowledges,[109] a court will decline to "second-guess" the judgment of a legislator or his aide on what is deemed relevant for an investigation. Indeed, in *Doe* v. *McMillan*,[110] the Court unequivocably avoided any such entanglement by saying, "[W]e have no authority to oversee the judgment of the Committee in this respect or to impose liability on its Members if we disagree with their legislative judgment."

The majority argue that this case is different from *Doe* because in *Doe* the Committee itself found the "private" data to be relevant to its investigation, thus precluding further judicial inquiry. Here, however, with a concession of irrelevance by the investigator, the majority contends, there is sufficient doubt about "arguable relevance" to warrant a denial of summary judgment. This decision still amounts to "second-guessing" the legislative process since it overrides an independent estimate of relevance that could be "plausibly interposed,"[111] and it appears to override a judgment of relevance inferable from the subpoenas.[112] Given the permissiveness of the majority's own standard for protected investigative activity, *i.e.*, whether there is "a *claim* of *conceivable* legislative interest,"[113] there is no justification for further proceedings.

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[109] Maj. op. at 38 n. 66.

[110] 412 U.S. 306, 313 (1973).

[111] See n. 118, *infra*.

[112] See n. 123, *infra*.

[113] Maj. op. 38 n. 66 (emphasis added.)

C.

In no way can we agree with the majority that the documents which they term "concededly irrelevant to legislative inquiry" were indeed not relevant to the inquiry undertaken by the Senate Subcommittee here. The documents referred to are some of the 234 taken by Brick and returned by him to the McSurelys on 8 November 1968. From the inventory list put in evidence at the McSurely contempt trial [114] it is apparent that a number of these were personal letters of the McSurelys. The contents of these letters may or may not have been relevant to the Senate inquiry, but surely the names of the people with whom the McSurelys were in contact were highly relevant. Some names no doubt were merely personal friends, others were from the return addresses obviously relevant to the actions with which the inquiry was concerned. The Senate investigator was required to take these to the Committee to examine. The Senators or others on the staff may easily have seen something of significance in any one of these letters, definitely relevant to the inquiry of the Committee, which might have escaped the knowledge or attention of Brick.

Even if item 201 was indeed a love letter from Mrs. McSurely's former employer, this obviously could have been relevant to the Committee's inquiry. Mrs. McSurely's former employer was a highly influential nationwide syndicated columnist. He and what he wrote could be influenced by a woman for whom he had affection, either to write or to withhold from writing. He could have been influenced either to write favorably about the causes which the McSurelys espoused, or to withhold critical comment. He could have been influenced to write unfavorably about government officials who were investigating the McSurelys' actions. He could have revealed to the

[114] D.A. II 628-49.

McSurelys information about law enforcement investigations being made of the McSurelys, of which they would not have been cognizant without this columnist's particular sources of information.

The nature of the relationship between Mrs. McSurely and her former employer which was evidenced by this so-called "love letter" could have been of definite relevance to a Senate subcommittee's inquiry. Item 217, for example, is a single page document [115] giving addresses of Drew Pearson's office staff. Mrs. McSurely had not worked for Pearson for several years. This may have been an indication that she was maintaining contact not only with Pearson but with his office staff for purposes connected with her current activities in Tennessee and Kentucky.

Certainly these personal letters of Mrs. McSurely meet the standard of relevancy laid down by the majority. The majority opinion states: "In the usual case if the activity is *arguably within* the 'legitimate legislative sphere' the Speech or Debate Clause bars inquiry even in the face of a claim of 'unworthy motive'." [116] The majority also refers to materials "at least *arguably relevant* to its investigation," [117] and states that "the immunity shield . . . in an area that is at least *arguably within* a proper legislative sphere . . . is not a license to invade privacy where no legislative purpose can be *plausibly interposed*." [118] And on remand the trial court is instructed to inquire regarding "documents he knew to be *wholly unrelated to the legislative inquiry*." [119]

[115] D.A. II 648.

[116] Maj. op. at 37.

[117] Maj. op. at 42.

[118] Maj. op. at 37.

[119] Maj. op. at 44.

Surely these letters were "arguably within" the sphere of the legislative investigation and a legislative purpose for their examination by the Committee in Washington can be "plausibly interposed;" surely these letters are "at least arguably relevant;" they are not "wholly unrelated to the legislative inquiry."

Without deigning to give any reasons therefore, the majority blandly treats the Senate investigator Brick's testimony that he did not "need that letter signed [sic] Dearest Cucumber" as a final irrevocable concession binding on the Senate Committee and this court that this particular letter (and all other letters similarly characterized by the McSurelys) were totally irrelevant to the Senate inquiry. This is a rather astonishing assumption.

In the first place, Brick's testimony [120] was only an expression of his own need for the letter, not that of the Committee's. Brick had read the letter and presumably remembered any important features of its contents. Neither Chairman McClellan nor Brick's staff superiors had seen the letter and had had the opportunity to evaluate its contents.

Secondly, we are at a total loss to understand by what principle of law it can be held that a subordinate Senate Committee staff member can bind the Senate Committee, or indeed this court, on the question of relevance.[121]

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[120] D.A. II 734-36.

[121] Imagine, for example, that one of the congressional aides in *Doe* who sought out the school records testified that the school officials suggested that he delete the actual names of the students. Having declined the suggestion, the aide testified that he nonetheless believed at the time that the actual names were not necessary elements of the school records for purposes of the Congressional inquiry. If he so testified, would he be liable for invasion of privacy even though, as was the case in *Doe*, the Committee later had the names published as

Surely the determination of the relevance of any of the documents which Brick had inspected was for the Senate Committee, or under its usual operating procedures, for the Committee Chairman. The agreed facts are that "on October 16, 1967, at the personal direction of Senator John L. McClellan, he prepared the subpoenas involved herein." Brick took the subpoenas to McClellan, "with whom he had conferred on the subject matter thereof since October 6, 1967," [122] and McClellan signed the four subpoenas, two of which were directed to the McSurelys. This action of the Senate Committee Chairman, after a review of the copies of the documents brought back by Brick, evidenced the Committee Chairman's determination of what he thought was relevant for the Senate's inquiry, *i.e.*, the 234 documents.[123] What Brick said he

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relevant to its investigation? Surely not, since "the judgment of the Committee," as stated in *Doe*, 412 U.S. at 313, is to be respected on the determination of relevance. Nor should a court refuse to consider an objective case that can be advanced for "arguable" relevance if the judgment of a Committee is absent. This latter approach, as employed in the case at bar, is comparable to the long-time effort of the Supreme Court to assess possible purposes and reasons that support the constitutionality of legislation even if the legislature does not fully articulate them. See *e.g.*, *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955). Thus, the majority acts with unnecessary confinement in its unexplained insistence, Maj. Op. (Supplement) at 53, on limiting consideration to claims of relevance found on in the record.

[122] Stip. 12, App. 21.

[123] The majority takes the position "that the subpoenas called for materials that were at least arguably relevant to its investigation, but did not call for the production of Mrs. McSurely's letter or any other demonstrably irrelevant private correspondence." Maj. op. 42. We suggest that this interpretation by the majority is simply not justified, because since 1967 all parties to this law suit, *i.e.*, the Senate Committee personnel and the McSurelys themselves, have taken the position that the subpoenas both of October 1967 and

November 1968 were intended to embrace *all* the 234 documents taken by Brick to Washington. There is no hint in either Senator McClellan's conduct of the Subcommittee inquiry or in Brick's testimony that anything other than the 234 documents were expected to be produced by the subpoena. McSurely himself testified:

> Q. Did Mr. Brick attempt to find the documents that he wanted you to bring back in response to the subpoena with which you had been served that day?
>
> McSurely. Mr. Brick?
>
> Q. Did he identify them?
>
> A. He identified them in general. He said this was in general what the McClellan committee wanted. Of course *they had already had it for a year and a half.* D.A. II 651. (Emphasis supplied.)

And further

> Q. On March 4, when you and your wife appeared . . . did either of you have with you in your possession the records called for by the Subpoena?
>
> A. We do not have a record because we didn't know what records they wanted. We assumed from what Mr. Brick had told me that they wanted pretty much of those letters that they had stolen from us by Mr. Ratliff . . . that was the only thing that we understood they wanted. It was very difficult to tell, from reading that subpoena, what they did want." D.A. II 674-675.

McSurely further testified: "We finally got the papers back and when the day came that we got them back, Mr. Brick, sitting back there, comes down and goes over the record with me and makes sure I got them all back and then has a Deputy U.S. Marshal give me another subpoena *to bring the same papers back up there again. . . .*" D.A. II 665. (Emphasis supplied.)

The majority quotes, Maj. Op. at 42 n. 76, what appears to be a concession by appellants that the subpoena did not call for the production of the private letters. Any support derived from this quotation, however, is wholly illusory. The footnote expressly states that the concession is offered only "*if*" the letter was nothing more than a love letter and "*if*" it was not relevant to any possible investigation into riots. Given a plausible showing of possible relevance, as has been

himself "needed for the performance of [his] duties" [124] is of little importance in determining what the Senate Subcommittee might reasonably find relevant for its inquiries.

We would hold that, relevant or irrelevant, the Senate investigator's actions in regard to the allegedly personal letters of the McSurelys are in no way a ground for a claim of constitutional significance, as the Supreme Court held in *Paul* v. *Davis*, *supra*, and since the McSurelys have alleged no other type claim on this basis, their action on this point should be dismissed.

But if the question of relevance or irrelevance of these letters is necessary to be decided in this lawsuit, we suggest that the trial court on remand is no better place to

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interposed here, appellants' concession, by its own terms, is without weight.

All the uncontroverted testimony, quoted above, about the scope of the subpoenas is particularly important because the nature of the subpoenas here makes it impossible to determine their reach by textual examination alone. The subpoenas called for documents depending upon their content, *e.g.*, all correspondence relating to the employment of the McSurelys by the United Planning Organization in Washington, D.C. for the period 1 January 1964 to date. Paragraph Eight, Subpoena of 17 October 1967, App. 70. (Item 201, the "love letter" from Drew Pearson was dated 6 October 1964, a date that was included in virtually all of the periods listed in the subpoenas.) The subpoenas, it should be noted, covered a wide range of organizations in various parts of the country. The private correspondence of the McSurelys, the content of which remains unknown, may well have involved the groups and the activities listed in the subpoenas. It cannot, therefore, be flatly asserted that the private letters fell outside the scope of the subpoenas. Given the independent estimate of "arguable" relevance, however, it is not necessary to remand on the unsettled reach of the subpoenas. There is already enough basis for finding that the transportation of the documents to Washington, D.C. constituted protected legislative conduct.

[124] D.A. II 735.

decide it than is this appellate court. The only personal letter specifically referred to by the McSurelys, and discussed by the majority opinion, was destroyed, original and only copy, on its return to Mrs. McSurely. Its relevance or irrelevance would indeed be hard to establish. For the reasons stated above, on the standard of relevance set out by the majority, both this personal letter and the others of the McSurelys were "at least arguably relevant" to the Committee's inquiry. Certainly Brick, only a subordinate staff investigator, was justified in taking copies of them to the Committee Chairman and his staff superiors for their own evaluation.

V. Conclusion

The absolute immunity afforded by the Speech or Debate clause in *Bivens*-type suits reflects the judgment that the public interest in encouraging the fearless and vigorous activity of its elected representatives outweighs the interest of the individual in seeking redress by money damages for violations of his rights. At the heart of that judgment is the recognition, with the late Learned Hand, that "as a litigant I should dread a law suit beyond almost anything else short of sickness and death".[125] Without absolute immunity all claims against representatives, both "innocent as well as guilty," would proceed to trial, with the consequent damage, as Learned Hand again put it, of "dampening the ardor of all but the most resolute." [126]

In applying the balancing process described above, however, the Supreme Court has been sensitive to the functional nature of the protection. Where an activity

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[125] 3 Lectures on Legal Topics, Association of Bar of the City of New York (1926), quoted at *Johnson* v. *Louisiana*, 406 U.S. 356, 392 (1972) (Douglas, J., dissenting).

[126] *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

like pre-subpoena investigation is concerned, not at the core of the legislative process, as is voting, and where harm to the individual is alleged from a constitutional violation, like an unreasonable search and seizure, then the balance will be struck differently and the trial will proceed. Such is the holding of *Dombrowski* v. *Eastland*.[127]

Since, as the majority acknowledges,[128] the Speech or Debate Clause has been "read broadly to effectuate its purposes," *United States* v. *Johnson*,[129] exceptions to its protection, as when legislative investigation violates the Fourth Amendment, should customarily be read narrowly. The *Dombrowski* rule originated with a classic violation of the Fourth Amendment, a massive police raid akin to the original seizure here by the local police. Perhaps allegations of a clear and classic Fourth Amendment offense, as in *Dombrowski*, ought to proceed to litigation where evidence provides "merely colorable substance" of a violation.[130] The permissive threshold of evidence employed in *Dombrowski*, however, is inappropriate here where the Fourth Amendment claim is so novel and

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[127] 387 U.S. 82 (1967). Indeed, actions by Congressmen may be so "extraordinary" as to lose absolute immunity even in regard to core legislative functions. Mr. Justice Miller hypothesized in the leading case of *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1881), that if members of Congress went so far "as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation," then their freedom of speech and debate would not necessarily screen them from punishment for their part in the act.

[128] Maj. op. at 12.

[129] 383 U.S. 169, 180 (1966).

[130] Maj. op. at 22.

borderline;[181] a greater showing of a violation should be required to justify a remand.

The purpose of an absolute immunity is to cut off claims against protected parties at the outset. To be true to this purpose, a court should make every effort to determine if a claim is inside or outside the protection of the Speech or Debate clause. A remand for further factual proceedings on the issue of absolute immunity itself should be required only in the case of clear need. Otherwise the "mini-trial" that the defendant is forced to undergo constitutes an erosion of the principle of absolute immunity. The majority is engaging in such an erosion of the Speech or Debate clause here.

The uncontroverted facts of this case, the logic of the Fourth Amendment, and the available case law support our conclusion here that the inspections and copying by Brick did not amount to an unreasonable search and seizure. Not only does the majority err in its contrary conclusions, but it abrogates its duty in deciding absolute immunity by calling for a remand.

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[181] *Cf.*, *Brown* v. *Illinois*, 422 U.S. 590 (1975) (Powell, J., concurring) (the degree of evidence required for finding of volition under the "fruits" doctrine should differ depending on degree of offensiveness of search).

DANAHER, *Senior Circuit Judge*: I have previously noted and now repeat my concurrence in the opinion prepared by Judge Wilkey. I venture to suggest an alternative basis for our disposition of this case.

It will be remembered that the McSurelys in this action are seeking damages. They had been under subpoena *duces tecum* to appear on March 4, 1969, before a United States Senate Subcommittee. A quorum of the Subcommittee was present. That day—and before presenting themselves at an executive session of the Subcommittee—the McSurelys had filed their complaint in the United States District Court under No. 516-69-CA. That was the complaint in this action.[1] Named as defendants, in addition to certain Subcommittee staff representatives, were all members of the SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS including Senators McClellan, Jackson, Ervin, Muskie, Ribicoff, Griffin, Mundt, Percy and Javits.

Mr. William M. Kunstler, counsel to the McSurelys, presently joined by co-counsel, Mr. Philip J. Hirschkop, announced that Mr. Alan McSurely and Mrs. Margaret McSurely were present. Chairman McClellan made an opening statement tracing the history of various major riots and civil disturbances and other background circumstances which the Subcommittee's investigations had disclosed up to that date.

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[1] The complaint, to be sure, was amended when, more than two years later as of August 30, 1971, Commonwealth's Attorney Ratliff was added as a defendant. Those members of the Subcommittee's staff who had been named as defendants were retained, as was the Subcommittee Chairman, Senator McClellan. All other senators, *supra*, were dropped from the case.

Mr. Kunstler in moving that the executive session of the Subcommittee be opened to the public stated that the grounds for his motion were set forth in detail in the complaint filed that day.

The Subcommittee's subpoena *duces tecum* had called for the production of books, records, correspondence, documents and other papers in the possession or control of Alan McSurely or Margaret McSurely or their agents which related or pertained to:

> (1) Meetings, from April 5 through April 8, 1967, attended by Alan McSurely and Margaret McSurely as individuals or as members or employees of Southern Conference Educational Fund . . . prior to the civil disturbances (riots) which occurred in Nashville, Tennessee, on or about April 8, 1967;
>
> • • • •
>
> (3) All books, records, correspondence, documents, and other papers which relate to or are concerned with the membership in or employment by the Southern Conference Educational Fund of Alan McSurely and/or Margaret McSurely.
>
> • • • •

The McSurelys refused to comply with the Subcommittee's subpoena, and in due course, following the submission of the Subcommittee's report to the Senate, they were cited for contempt.[2] Following their conviction, they brought their appeals to this court, the judgments of conviction were reversed, and the case was remanded to the district court which was directed to enter judgments of acquittal. *United States v. McSurely*, 473 F.2d 1178 (1972).

This court's opinion recited, *id.* 473 F.2d at 1194:

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[2] *See* S. Res. 191, 91st Cong., 1st Sess., 115 CONG. REC. 11278 (May 5, 1969).

> The information upon which the Subcommittee subpoenas were framed was derived by the Subcommittee through a previous unconstitutional search and seizure by the Kentucky officials and the Subcommittee's own investigator. We hold that the "exclusionary rule" applies to these subpoenas and that it was error for the District Court to receive them in evidence at the trial.[3]

THE MCSURELY CLAIM

The McSurelys assert that the search and seizure conducted by the state authorities was illegal as based upon an unconstitutional statute. From that premise they contend that the Senate investigator gleaned his knowledge by reliance upon the illegal Kentucky seizure. Thus, the Senate Subcommittee subpoena was illegal, and accordingly with their rights so violated, the McSurelys claim damages from Senator McClellan and certain members of his staff.

KENTUCKY CHRONOLOGY

On the night of August 11, 1967, Kentucky officials in Pike County, Kentucky, had arrested the McSurelys, and from their home had seized a substantial volume of books, pamphlets, correspondence and other documents. The Kentucky officials then had relied upon K.R.S. 432.040.[4]

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[3] That was a criminal case. The Court, after a careful review of the authorities, has now concluded that the judicially created exclusionary rule is not to be applied in a case such as this. United States v. Janis, —— U.S. ——, ——, 44 U.S.L.W. 5303, 5311 (July 6, 1976).

[4] In Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), the Court noted that Anti-Syndicalism Statutes had been adopted by some 20 states. When the Louisiana Three-judge Court wrote in Dombrowski v. Pfister, 227 F.Supp. 556 (1964), the majority at 567-569 had attached Appendix C listing those

Alan McSurely, Margaret McSurely, Southern Conference Educational Fund, Inc.,[3] and other plaintiffs then brought action against Thomas B. Ratliff, Commonwealth's Attorney, Pike County, Kentucky, Pike County Sheriff Perry A. Justice and others.

Attorney Kunstler on August 17, 1967, moved that a three-judge court be convened, and that court, so convened, entered its order as of September 14, 1967, that the statute, *supra*, was unconstitutional. Accordingly prosecution of the McSurelys in the Kentucky courts was enjoined.

So it was that not until September 14, 1967, could the Kentucky officials have known[4] that K.R.S. 432.040 was unconstitutional.

Nearly two months were to elapse following the August 11 seizure before Subcommittee staff representatives learned what had happened.

The Three-judge Court handed down its opinion on October 18, 1967, in *McSurely, et al. v. Ratliff, et al.*, 282 F.Supp. 848, one judge dissenting.

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states including Kentucky which had passed legislation comparable to K.R.S. 432.040.

[3] *Compare* Dombrowski v. Pfister, 380 U.S. 479 (1965), where at 482, the Court noted "Appellant Southern Conference Educational Fund, Inc. (SCEF) is active in fostering civil rights for Negroes in Louisiana and other States of the South. Appellant Dombrowski is its Executive Director." *And see, id.*, 493, where SCEF had been denominated a "Communist Front organization."

[4] The validity of the Kentucky statute had never been called into question, McSurely, et al. v. Ratliff, et al., 282 F.Supp. 848, 849 (1967).

See United States v. Janis, *supra*, note 3 at 5311 n.35 and cases there cited.

Meanwhile Chairman McClellan had determined that the McSurely documents and other papers were pertinent to the investigation being carried on by the Senate Subcommittee. In execution of the Subcommittee's duties within the sphere of legitimate legislative activities, *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), he caused to be issued identical subpoenas *duces tecum* which were served on Ratliff and Marshal Craft on October 17, 1967, and on the McSurelys on October 18, 1967.

As of October 18, 1967, the plaintiffs sought an order enjoining the release of the seized documents "pursuant to a subpoena duces tecum of the Senate Permanent Subcommittee of Investigations of the Committee on Government Operations."

That motion was denied by the Three-judge Court on October 30, 1967, and the order further concluded:

> The parties to this action and the officers of this Court are directed to cooperate with the Senate Committee in making available such of the materials, *or copies thereof*, as the Committee considers pertinent to its inquiry . . . . (Emphasis added.)

The "FINAL ORDER" of the Three-judge Court filed December 15, 1967, directed that Ratliff

> comply with the subpoena duces tecum of the Senate Committee by allowing said Committee representatives to photograph copies of any of the desired books, papers, documents and other materials now in his possession under order of this Court . . . .

The Supreme Court having denied relief, the appellants including Southern Conference Educational Fund, Inc., were remitted to an appeal to the Sixth Circuit. That court in its opinion, *McSurely, et al. v. Ratliff, et al.*, 398 F.2d 817 (1968), noted that the appellants had contended that their rights under the First and Fourth Amendments had been violated. That court, *id.*, 398

F.2d at 818, ruled that the claims of the appellants might be adjudicated under "appropriate procedure for challenging subpoenas of Congressional Committees. We decline to render an advisory opinion on these issues." The court continued that the judgment of the district court was reversed "without prejudice to the right of the Senate Committee to proceed with the enforcement of the subpoenas against Mr. and Mrs. McSurely."

SENATE BACKGROUND

It is common knowledge that during the nineteen-sixties the Nation confronted turmoil in many areas. There were riots, student uprisings, growing dissatisfaction over the Vietnam War, unsettling assassinations of public figures, strikes over mining conditions, and multiple instances of racial and other social and economic disparities of disturbing nature. It is abundantly clear from the record that the senators considered that causes of the rioting and disturbances were part and parcel of economic and social problems.[7]

Senator Mansfield on August 11, 1967, made Senate Resolution 150 the order of business. Extensive debate followed, some senators desiring investigation into specific situations, with others seeking to emphasize economic and social factors as causes of riots. Some felt that there was just reason for grievances which had caused an environment, both physical and mental, out of which disturbances emerged. Details may be seen in Volume 113, Part 17, Congressional Record, 90th Cong.,

[7] *See generally* Senate Report No. 91-137, May 1, 1969, 91st Congress, 1st Session. In addition to other facts developed during the Subcommittee's investigation, that Report specifically noted that on April 7, 1967, the day before the Nashville riots, the McSurelys were there attending a secret meeting of the directors of the Southern Conference Educational Fund.

1st Sess., pages 22409 through 22425.[8] S. Res. 150 was finally adopted unanimously after the senators were satisfied that the resolution met their requirements. Continued committee operations were further authorized by S. Res. 216, 90th Cong., 2d Sess., and finally by S. Res. 26, February 17, 1969, 91st Cong., 1st Sess.

PERTINENCY

Of special importance to us at this point are Sections 5 and 6 of S. Res. 150 as applicable pursuant to the extended life and authorization of the Committee by S. Res. 216 and S. Res. 26, *supra*. The exact text of those sections may be seen in footnote 5, *United States v. Fort*, 443 F.2d 670, 672-673 (C.A. D.C. 1970), *cert. denied*, 403 U.S. 932 (1971). The Senate had deemed particularly relevant the requirement that the Committee, (or its Subcommittee), make a full and complete study of riots and other disturbances and ascertain "immediate and longstanding causes, . . ." and thereafter report with specific legislative recommendations as to "measures necessary for their immediate and long-range prevention and for the preservation of law and order and to insure domestic tranquility within the United States."

It would seem that the activities of the McSurelys in behalf of Southern Conference Educational Fund and like entities came squarely within the scope of the Subcommittee's investigatory duties. The Three-judge Court opinion, *McSurely, et al. v. Ratliff, et al.*, 282 F.Supp. 848 (October 18, 1967), recited details. The Court iden-

[8] Congressional inquiry by various committees had been so extensive that Senator Jackson listed and identified, *id.*, pages 22417 and 22418, some 110 witnesses whose testimony concerning problems in the area under consideration had helped to establish an awareness of the need for investigation and for possible corrective legislation.

tified the McSurelys, husband and wife, as "field organizers for plaintiff Southern Conference Educational Fund, Inc.," 282 F.Supp. at 850,[9] and pointed to the claim of the McSurelys that "their official duties are to investigate the socio-eco-political milieu of Pike County, 'to inform the people of their rights', and to help local citizens 'organize to overcome their problems'." *Id.* at 850.

In view of what the McSurelys themselves had contended, as the Three-judge Court noted, *supra*, Chairman McClellan and the Subcommittee may well have concluded that the McSurelys would prove to be prime witnesses concerning the economic and social problems prevalent in Kentucky.

DISCUSSION

The opinion of the Sixth Circuit Court of Appeals, *supra*, 398 F.2d 817, had been released as of July 29, 1968. The court there assuredly had been aware of the previous orders entered in the course of the litigation. After directing that the seized materials be returned to the plaintiffs, the court expressly ruled that its action was "without prejudice to the right of the Senate Committee to proceed with the enforcement of the subpoenas against Mr. and Mrs. McSurely."

So it was that *four months later* on November 8, 1968, *new* Subcommittee subpoenas were served upon the McSurelys. That important fact has been little noticed. Those were the subpoenas in response to which the McSurelys had appeared but refused to testify on March 4, 1969. That was the date when the instant action was commenced.

[9] In view of the references by that court at 851 and 852, *id.*, and the citation of Dombrowski v. Pfister, *supra* note 5, it is not to be supposed that either the court or the Subcommittee had overlooked the operations of the Southern Conference Educational Fund, Inc., as described in Dombrowski.

Moreover, the Senate Report, *supra* note 7, incorporated references to the earlier litigation and quoted from McSurely et al. v. Ratliff et al., 398 F.2d 817 (CA 6 1968), predicating the new subpoenas dated November 8, 1968, *infra*.

Whether the Senator and his staff aides should have defended upon the Speech or Debate Clause or on other grounds may seem, at this moment, to be immaterial. One is reminded of the brilliant aphorism of Mr. Justice Holmes in *Irwin v. Gavit*, 268 U.S. 161, 168 (1925). There he said:

> Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law . . . . Day and night, youth and age are only types.

Whether to provide complete immunity for the Senator and his staff by reliance upon the Speech or Debate Clause, or whether we see an affirmative interference with an on-going activity by Congress, the ultimate result is the same. Whatever the status of the claims of these plaintiffs, the public interest here is superior and must prevail. The duly authorized activity of a coordinate branch of our government, in the circumstances here, should not be circumscribed[10] by the courts.

[10] The gradations between absolute immunity and qualified immunity and situations where one or the other classification may apply need not now detain us in light of our record. Moreover, whereas in the criminal case, United States v. McSurely, *supra*, 473 F.2d at 1194, the exclusionary rule had been said to have its place, it has none here. This is a civil action.

The Court has told us that consistently with our duty to administer the law, we cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is not ours.

> . . . We therefore hold that the judicially created exclusionary rule should not be extended to forbid the use in

We should not, and in the view now to be suggested, can not ignore what has been happening. As was pointed out in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 511 (1975);

> This case illustrates vividly the harm that judicial interference may cause. A legislative inquiry has been frustrated for nearly five years, during which the Members and their aide have been obliged to devote time to consultation with their counsel concerning the litigation, and have been distracted from the purpose of their inquiry. The Clause was written to prevent the need to be confronted by such "questioning" and to forbid invocation of judicial power to challenge the wisdom of Congress' use of its investigative authority.[17]

And see, id., 421 U.S. at 511, n. 17.

SUMMARY

What we have here is a situation where Congress through the Subcommittee had been engaged in execution of an indispensable function. The Subcommittee had been directed to investigate the causes of unrest. Surely the Subcommittee was free to seek the data essential to an informed judgment with respect to possible ameliorating legislation if deemed necessary, and thereupon to submit appropriate recommendations for correctives. In the performance of its duty, the Subcommittee had a right in the public interest to ascertain pertinent facts from a citizenry competent and duty-bound to testify respect-

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the civil proceeding of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign. United States v. Janis, —— U.S. ——, ——, 44 U.S.L.W. 5303, 5311 (July 6, 1976). *Cf.* United States v. Calandra, 414 U.S. 338, 347 (1974) and United States v. Peltier, 422 U.S. 531, 538 (1975). And *see* Scheuer v. Rhodes, 416 U.S. 232, 247-248 (1974); Pierson v. Ray, 386 U.S. 547, 555 (1967).

ing the Nation's social, economic or political system. Senator McClellan and the members of his staff were entitled *under the circumstances here presented* to complete immunity from such claims as have been advanced by the McSurelys.

It has long been recognized as was pointed out in *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) that "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." Even more specifically, the Court, *id.*, 378, has told us:

> Investigations, whether by standing or special committees, are an established part of representative government. Legislative committees have been charged with losing sight of their duty of disinterestedness. In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses. The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province.[11] (footnotes omitted).

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[11] While Mr. Justice Douglas had broadly agreed with the majority opinion in *Tenney* even as he took a slightly modified view of what had been said, he recognized, 341 U.S. at 382, that privileged were "the actions of legislative committees that are authorized to conduct hearings or make investigations so as to lay the foundation for legislative action."

Well he might so have conceded for it long since had been established that

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

Having in mind the treatment, *generally*, in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), and other cases,[12] it would be nothing short of supererogation were we now to undertake our own delineation of the scope of congressional immunity, whether under the Speech or Debate Clause[13] or by specification of the extent of official immunity on other grounds. The Court itself has recognized distinctions depending upon the facts. *Barenblatt v. United States*, 360 U.S. 109 (1959), applied a "balancing" test where First

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[12] *See, e.g.*, Dombrowski v. Eastland, 387 U.S. 82 (1967), where the claim against Senator Eastland had been dismissed but where the case against Counsel Sourwine was remanded. Even then, after hearing and argument, the Sourwine case was dismissed by the District Court "with prejudice" on August 12, 1970; *cf.* Doe v. McMillan, 412 U.S. 306, 312-313 (1973) and Barenblatt v. United States, 360 U.S. 109 (1959).

[13] Note the succinct observation of Mr. Justice Marshall, *id.*, 421 U.S. at 514:

> If the Senators' actions were within the "legitimate legislative sphere," the matter ends there and they are answerable no further to the court.

And so as to their counsel's actions, he said, citing cases and his note 1.

Quite different treatment would have been necessary as to the Subcommittee's staff members if they, on their own, had so conducted themselves as did the Kentucky officials on the night of August 11, 1967. That simply is not this case. We cannot even suppose that the Congress or one of its Subcommittees could-or would attempt to-authorize an unconstitutional search and seizure but, under circumstances such as are shown on this record, a coordinate branch of our government in the duly authorized execution of its duty when acting in the public interest is not to be deprived of relevant and pertinent evidence. The Subcommittee's staff should here be "answerable no further to the court."

Amendment aspects were presented. There the Court, *id.*, 111, saw itself required to resolve the Constitutional claims of congressional power in contrast to an individual's right to resist its exercise. It was concluded finally that the individual interest was to be subordinated to that of the government. *id.*, 134. *Compare Imbler v. Pachtman*, 424 U.S 409, 418 (1976), where the Court read the *Tenney* opinion as having recognized that in some situations there are general principles of tort immunities which will control and which must be harmonized as to claims predicated upon § 1983.

Imbler has demonstrated for us the treatment as to differing officials, whether immunity was to be absolute, as having been developed at common law or as having stemmed from the provisions of federal and state constitutions. Principles of public policy in some situations will clearly fortify a conclusion of absolute immunity. *Id.* 424 U.S. at 422 and *see, id.* at 424. *Compare*, cited by the Court, *Yaselli v. Goff*, 12 F.2d 396, 406 (CA 2, 1926), affirmed 275 U.S. 503 (1927); *Gregoire v. Biddle*, 177 F.2d 579, 581 (CA 2, 1949), *cert. denied*, 339 U.S. 949 (1950).

Whatever might have been true in the past, no longer "are we troubled by the question where to draw the line." *Irwin v. Gavit, supra.* In view of the background hereinbefore developed, it becomes crystal clear that the public interest must prevail, and we draw the line accordingly. A Subcommittee of the United States Senate was engaged in the truthfinding process which it had been commanded to execute. So it is that the Chairman of that Subcommittee and the members of its staff, under the circumstances[14] here, should be entitled to absolute immunity.

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[14] The claims of the McSurelys here sound hollow indeed, especially where now, some nine years and multiple amendments later, they would complain of the "publicity" which

It is respectfully submitted [15] that this case should be remanded to the District Court with directions to dismiss the complaint.

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they had so long sought, whenever or wherever the opportunity arose. For example, as they flouted the Subcommittee's subpoenas, their attorney Kuntsler demanded that the Subcommittee's executive session be opened. Their co-counsel Hirschkop announced that there were 100 people outside the hearing room pressing for admittance only to find their efforts were being suppressed by police—or so he said.

Perceptive Subcommittee Senators, members of a coordinate branch of our Government, well aware of the respective rights of the parties (cf. Ansara v. Eastland, 442 F.2d 751, 754 (1971)) ruled against the McSurelys. The Senate unanimously approved the Subcommittee resolution, *supra*, note 2.

Certainly the absolute immunity to be accorded to the Senators is available to protect from the burden of defending themselves the "officers or employees of a legislative body". Dombrowski v. Eastland, 387 U.S. 82, 85 (1967).

Without further detailed classification of distinctions between absolute immunity, qualified immunity, arising under circumstances to be noted in cases previously cited, or whether the source of the claim stemmed from alleged tortious conduct or statutory or constitutional bases, these federal defendants should be protected.

We need not reach whatever other aspects of the McSurely claims have been pressed. The ultimate fact remains, the Subcommittee and the Senate itself, had ratified the actions of the Senators and of the members of the staff of the Subcommittee.

Any other view would present "a serious and delicate exercise of the judicial power." United States v. Smith, 286 U.S. 6, 48 (1932); cf. Powell v. McCormack, 395 U.S. 486, 517 (1969). *See generally*, Consumers U., Etc. v. Periodical Corr. Ass'n., 515 F.2d 1341, 1351 (C.A. 2 1975).

[15] What has herein been said in no way is submitted in derogation of Judge Wilkey's splendid statement of the facts. Rather, one may hope that the chronology as developed and the treatment now tendered may be considered as an alternative predicate for our disposition of this case.

APPENDIX B

Alan McSURELY and Margaret McSurely

v.

John J. McCLELLAN et al., Appellants.

No. 73–1991.

United States Court of Appeals,
District of Columbia Circuit.

Argued 26 Nov. 1974.

Decided 28 Oct. 1975.

Before DANAHER, Senior Circuit Judge, and LEVENTHAL and WILKEY, Circuit Judges.

Opinion for the Court filed by Circuit Judge WILKEY.

Opinion filed by Circuit Judge LEVENTHAL, concurring in part and dissenting in part.

WILKEY, Circuit Judge:

This appeal is from an order entered on 12 June 1973 by the District Court in an action brought by Alan and Margaret McSurely against Senator John L. McClellan and three of his aides in their individual capacity.[1]

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[1] This case has been before this court on one prior occasion, *McSurely v. McClellan*, 138 U.S.App.D.C. 187, 426 F.2d 664 (1970),

The plaintiffs' (appellees') suit seeks damages of $800,000 for alleged violations of their constitutional rights arising from the defendants' (appellants') use of materials taken from the home of the plaintiffs in an unlawful search and seizure by agents of the Commonwealth of Kentucky on 11 August 1967.[2] The District Court's order denied the defendants' motion to dismiss or for summary judgment, and allowed the suit to proceed over the defendants' objections.

Those objections, now made the principal points on appeal, are that further proceedings would violate defendants' right under the Speech or Debate Clause of the Constitution[3] not to be questioned outside Congress for their legislative acts, and that the use in a Congressional investigation by the defendant Senator and his committee aides of documents unlawfully seized by others was not barred by the Fourth Amendment. On these legal issues we largely agree with the defendants and therefore reverse the District Court; we remand, however, for the determination of certain disputed factual issues which conceivably might show plaintiffs to have a cause of action.

I. *Factual Background*

Reference is made to this court's earlier opinions in *United States v. McSurely*[4] and *McSurely v. Mc-*

as has been the related case of *United States v. McSurely*, 154 U.S.App.D.C. 141, 473 F.2d 1178 (1972).

[2] *See McSurely v. Ratliff*, 398 F.2d 817 (6th Cir. 1968); *McSurely v. Ratliff*, 282 F.Supp. 848 (E.D.Ky.1967).

[3] U.S.Const. art. I, § 6, cl. 1.

[4] 154 U.S.App.D.C. 141, 143-47, 473 F.2d 1178, 1180-84 (1972).

Clellan[5] for a detailed exposition of the factual background of this lawsuit. In brief, in 1967 Alan and Margaret McSurely were field organizers for the Southern Conference Educational Fund, Inc., in Pike County, Kentucky. Alan McSurely was also connected with the National Conference of New Politics and Vietnam Summer, both unincorporated associations. On the night of 11 August 1967, under authority of a warrant charging seditious activities against the Commonwealth of Kentucky in violation of KRS 432.040, officials of Pike County arrested the McSurelys and seized a large volume of books, posters, pamphlets, and other private and published documents found in their home.

On 14 September 1967, in response to a complaint filed by the McSurelys, a three-judge District Court in Kentucky held KRS 432.040 facially unconstitutional and enjoined state prosecution of the McSurelys.[6] In its order the court directed the Commonwealth Attorney for Pike County, Thomas B. Ratliff, to hold in safekeeping the materials taken from the McSurelys' house, pending his possible appeal of the court's decision. Shortly thereafter, the Assistant Counsel to the Permanent Subcommittee on Investigations ("Subcommittee") of the Senate Committee on Government Operations ("Committee"), Lavern Duffy, contacted Ratliff by telephone to inquire about the seized items. Ratliff had previously made a public announcement that the materials would be made available to Congressional committees.

As a result of the Duffy telephone call, in early

[5] 138 U.S.App.D.C. 187, 189-90, 426 F.2d 664, 666-67 (1970).

[6] *McSurely v. Ratliff*, 282 F.Supp. 848 (E.D.Ky.1967).

October 1967 John Brick, a Subcommittee investigator, visited Ratliff in Pikeville. After confirming with Ratliff that the McSurely material contained information relating to the activities of a number of organizations in which the Subcommittee was interested, Brick examined and made notes on the seized items. In addition, he was provided with copies of 234 of the documents, which he took with him on his return to Washington. Subsequently, on 16 October 1967, at the direction of Senator McClellan, Chairman of the Subcommittee, Brick prepared subpoenas for certain of the McSurely materials in Ratliff's possession which the Senator had determined would be of value to the Subcommittee investigation of riots which occurred in Nashville, Tennessee, in April 1967.

When the plaintiffs received the subpoenas, they filed motions with the three-judge court seeking orders blocking Ratliff from releasing the seized materials to the Subcommittee and directing him to return those materials to the McSurelys. This action culminated in a decision by the Sixth Circuit Court of Appeals in July 1968 that the documents must be returned to the McSurelys, but without prejudice to the right of the Subcommittee to proceed with the enforcement of its subpoenas.[7] The lower court thereupon directed Ratliff to return all of the seized materials on 8 November 1968. On the same day the McSurelys received the xerox copies of 234 documents which Brick had taken with him to Washington.

Upon receipt of these materials the McSurelys were immediately served with new Subcommittee subpoenas

[7] *McSurely v. Ratliff*, 398 F.2d 817 (6th Cir. 1968).

similar to the original ones. They appeared before the Subcommittee on 4 March 1969, but refused to produce the subpoenaed materials. Pursuant to a Senate resolution, the McSurelys were indicted for contempt of Congress on 29 August 1969; they were tried and convicted on 20 June 1970. On appeal, however, this court reversed that conviction.[8] The majority[9] of the court took the position that the exclusionary rule applied to proceedings before Congressional committees as well as to criminal prosecutions and, therefore, the Subcommittee's subpoenas were invalid as the fruit of an unlawful search and seizure.

The lawsuit from which the instant appeal derives was originally filed on the same day, 4 March 1969, that the McSurelys appeared before the Subcommittee. It was substantially modified by the plaintiffs in May 1971 when they sought and received permission to file an amended and substituted complaint. The defendants filed a motion to dismiss or for summary judgment which was heard and submitted for decision on 28 October 1971. When the Supreme Court decided *Gravel v. United States*,[10] and *United States v.*

[8] *United States v. McSurely*, 154 U.S.App.D.C. 141, 473 F.2d 1178 (1972).

[9] The writer of this opinion concurred only in the result reached by the majority. Arguing that application of the exclusionary rule to legislative hearings was wholly inappropriate, he voted to reverse the McSurelys' conviction, not because the subpoenas in question were based upon information obtained in an unlawful search, but because the Government had failed to make the necessary showing that all of the subpoenas' demands were pertinent to the Subcommittee's legitimate inquiry. *Id.* at 157-67, 473 F.2d at 1194-1204.

[10] 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972).

Brewster,[11] the parties submitted supplemental memoranda analyzing the relationship of those decisions to this case. On 12 June 1973 the District Court entered a one-sentence order denying defendants' motion. The defendants then moved for reconsideration of the Court's order—or certification under 28 U.S.C. § 1292 (b) of the issue of their official immunity—based in part upon the Supreme Court's recent decision in *Doe v. McMillan*.[12] The Court denied this motion on 9 July 1973. This appeal followed.

II. *Jurisdiction*

Before discussing the substantive validity of the District Court's order denying defendants' motion to dismiss or for summary judgment, we must determine whether this court has jurisdiction to review that order. Normally a denial of a motion for summary judgment is not appealable.[13] That is, it does not qualify as a "final decision" for the purposes of 28 U.S.C. § 1291.[14] The Supreme Court, however, has repeatedly emphasized that section 1291 must be given a "practical rather than a technical construction."[15] If the order of the District Court in this case has "sufficient

[11] 408 U.S. 501, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972).

[12] 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1974).

[13] *See, e. g., Ercona Camera Corporation v. Brownell*, 100 U.S. App.D.C. 394, 246 F.2d 675 (1957). *See generally* 10 C. Wright & A. Miller, Federal Practice and Procedure § 2715 (1973).

[14] The rationale for this rule is the salutary one of preventing piecemeal litigation and eliminating the delays that are occasioned by interlocutory appeals.

[15] *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

indicia of finality," it is appealable even though it is not a decision which ends the action.[16]

We have already had occasion to apply this principle in the instant case, although to a different order of the District Court.[17] That order of 18 December 1969 denied a motion made by the plaintiffs to stay—pending the resolution of this civil action—the criminal contempt proceedings which had been instituted against the McSurelys for their failure to comply with the Senate Subcommittee's subpoenas. (Significantly, the complaint in this case at that time included a prayer for preliminary and permanent injunctions to bar a prosecution for contempt.) When the McSurelys appealed the District Court's order, the Government argued to this court that we had no jurisdiction under section 1291 to review that ruling. We responded:

> At the core of the appellants' complaint is the claim that their rights will be irretrievably lost if the McSurelys are forced to trial on the criminal charges, regardless of the outcome. If the claim of a right to be free from prosecution is not determined before the criminal trials take place, it will be for all practical purposes lost.[18]

[18] We are not suggesting, of course, that this claim may not be raised as a defense to the criminal prosecutions. . . . Such a defense, if successful, would vindicate the McSurelys' right to be free from conviction, but the greater right—to be free of prosecution—could not be made whole.[19]

[16] *Brown Shoe Co. v. United States*, 370 U.S. 294, 308, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962).

[17] *McSurely v. McClellan*, 138 U.S.App.D.C. 187, 426 F.2d 664 (1970).

In sum, the court found the District Court's order sufficiently determinative of the McSurelys' constitutional claim to render the order a "final decision" on its merits. Significantly, we made clear that the jurisdictional issue raised by the appeal was separate from the question of the substantive validity of the McSurelys' contention:

> Our conclusion that the order involved is appealable in view of the nature of appellants' claims is not undercut by the fact that we do not adopt such of their contentions as we find open in the present posture of the case. Appellants present the claim that they will be subject to constitutional injury no matter what the course of events in the criminal proceeding. We have jurisdiction to consider that claim, even though we conclude, as will appear, that the criminal proceeding can be conducted so as to avoid trampling on appellants' constitutional rights.[19]

The constitutional claim made by the defendants in the instant appeal, arising from the District Court's denial of their motion for summary judgment, is based upon the clause providing that "for any Speech or Debate in either House, they [Members of Congress] shall not be questioned in any other Place."[20] This Speech or Debate Clause is read broadly to effectuate its purpose of protecting the independence of the leg-

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[19] *Id.* at 191, 426 F.2d at 668.

[19] *Ibid.*

[20] U.S.Const. art. I, § 6, cl. 1.

islative branch.[21] Its office is to shield Members of Congress not only from the consequences of litigation but also from the burden of defending themselves.[22] It blocks all inquiry into their legislative acts and the motivation for those acts.[23] Moreover, "the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." [24]

The defendants argue that their constitutional right to be free from questioning as to their legislative acts will be "irretrievably lost" if discovery is allowed to proceed in this case and they are subjected to the burden of a trial. Relying upon our earlier opinion finding appealable the District Court's refusal to stay criminal proceedings against the McSurelys, the defendants contend that the order of the District Court at issue here is effectively a "final decision" for the purposes of section 1291. The plaintiffs, on the other hand, argue that the defendants' assertion that further proceedings will deprive them of their rights under the Speech or Debate Clause begs a question which requires a plenary trial. Not every act by a legislator or a legislator's aide is a constitutionally protected "legislative act." Without adversary proceedings to re-

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[21] *United States v. Johnson*, 383 U.S. 169, 180, 86 S.Ct. 749, 15 L.Ed.2d 681 (1966).

[22] *Dombrowski v. Eastland*, 387 U.S. 82, 85, 87 S.Ct. 1425, 18 L.E.D.2d 577 (1967).

[23] *United States v. Brewster*, 408 U.S. 501, 525, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972).

[24] *Gravel v. United States*, 408 U.S. 606, 618, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972).

solve the disputed issues of fact in this case, the plaintiffs urge, this court cannot pass upon the defendants' claims of legislative immunity.

We find the argument of defendants to be the more persuasive. Plaintiffs' argument, as will be discussed more fully below, goes not so much to this court's jurisdiction to review the District Court's order as to the merits of the defendants' claim of immunity. Essentially, plaintiffs challenge the validity of defendants' claim that they are entitled to relief from suit as a matter of law. We emphasized in our earlier opinion in this case that the question of appealability does not turn on the correctness of an appellant's claim (at least so long as it is not frivolous). Rather, the issue is whether his right to appellate review of that claim—whether ultimately successful or not—will be effectively lost if jurisdiction is denied.

The defendants assert that their actions in this case are completely insulated from judicial inquiry by the Speech or Debate Clause. That claim is clearly not frivolous. If they are required to respond to interrogatories, answer questions put in depositions, and defend themselves in a plenary trial covering the whole of their activities, they will have been forced to surrender their claimed privilege regardless of its validity.[25] An

[25] It might be argued, by analogy to the jurisdictional rule generally applied to mandamus petitions, that the defendants cannot claim irreparable injury arising from the District Court's order so long as the possibility remains open that it can be disobeyed and reversed on appeal from a contempt citation. *Cf. United States v. Ryan*, 402 U.S. 530, 532, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971); *United States v. Anderson*, 150 U.S.App.D.C. 336, 464 F.2d 1390 (1972). However, in a case such as this—involving the invocation of a privilege central to the separation of powers between the legislative, executive, and judicial branches—we think that requiring a United States Senator to hold himself in contempt in order to protect that privilege would be "a course unseemly at best." *Nixon v. Sirica*, 159 U.S. App.D.C. 58, 65 n. 21, 487 F.2d 700, 707 n. 21 (1973).

appeal from the final judgment in the action will come too late to give meaningful review of their claim. We hold, therefore, that as to the defendants' assertion of immunity from inquiry, the District Court's order denying summary judgment was a "final decision" under 28 U.S.C. § 1291.

We are highly cognizant, however, of one implication of the District Court's order denying summary judgment, *viz.*, that there are disputed questions of fact which remain to be resolved in this case. As will be demonstrated in Parts IV and V below, some of these factual disputes are made immaterial by our determination of the legal issue of legislative immunity. Even accepting as accurate the plaintiffs' allegations in these areas, the legislative activities which they address were fully protected under the Speech or Debate Clause. As to these activities, the defendants are entitled to summary judgment in their favor.

Other activities allegedly engaged in by the defendants, however, may not be so protected. Plaintiffs urge the necessity for full discovery and a plenary trial to develop the facts as to these activities. Although there is little evidence in the record to support many of the plaintiffs' most critical factual claims, the District Court's blanket denial of summary judgment leaves all of these claims in issue. We are in no position to second-guess the court's first-hand determination that further proceedings are required to ascertain the truth

of the plaintiffs' allegations. Nevertheless, in view of the ease with which discovery into alleged conduct of the defendants not protected by the Speech or Debate Clause can infringe the defendants' right to be free from inquiry into legislative acts which are so protected, we think it necessary to give the District Court some guidance in confining plaintiffs' discovery, and any trial which may follow, to conduct of the defendants outside the constitutional fold.

III. *Pleadings*

Plaintiffs' amended and substituted complaint names as defendants, in addition to Senator McClellan and John Brick,[26] Jerome Adlerman and Donald O'Donnell, the General Counsel and Chief Counsel of the Senate Subcommittee.[27] Damages in the sum of $200,000 per defendant are sought for alleged violations of the plaintiffs' rights under 42 U.S.C. §§ 1981, 1983 and 1985, and under the First, Fourth, Fifth, and Fourteenth

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[26] John Brick died during the pendency of this appeal, and we asked the parties to submit memoranda on the question whether plaintiffs' action against Brick survived his death. Our remand does not completely foreclose the possibility that Brick may be found to have engaged in otherwise actionable activity; however, the charges which we find potentially viable are at present totally devoid of evidentiary backing. The defendants do not challenge the survival of plaintiffs' action against Brick, and we are reluctant to decide this complex question without a more complete factual record.

[27] The complaint also includes as a defendant Commonwealth Attorney Ratliff. It does not appear, however, that the plaintiffs have pursued their action against Ratliff. In any event, the Government does not represent Ratliff and the instant appeal is not taken on his behalf. Def. Br. at 11 n.8.

Amendments of the Constitution.[28] The primary activities which the plaintiffs claim give rise to these violations are as follows:

(1) The unlawful search and seizure of the McSurelys' books and papers by Kentucky authorities.

(2) The inspection by Brick of those unlawfully seized materials.

(3) The transport by Brick of copies of 234 documents to Washington.

(4) The inspection of some or all of those 234 copies by the staff of the Subcommittee.

(5) The use of the copies, and Brick's inspection of the documents themselves, as the basis for issuance of subpoenas for some of the documents.

(6) The procurement of Contempt of Congress citations against the plaintiffs by consciously withholding from the Senate the facts relating to the challenged subpoenas.

(7) The dissemination of some or all of the 234 copies obtained by Brick to persons or agencies outside of the Subcommittee—particularly the Internal Revenue Service.[29]

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[28] Jurisdiction is founded on 28 U.S.C. §§ 1331, 1332, and 1343 (3) and (4) (1970).

[29] The claim that the copies of the 234 documents may have been turned over to the Internal Revenue Service was not made in the plaintiffs' amended complaint. Indeed, it did not arise until shortly before oral argument on this appeal. At that time, the disclosure of certain documents of the IRS, made as the result of a suit under the Freedom of Information Act, indicated that beginning on 28 August 1968 there were contacts between members of the staff of the Permanent Subcommittee on Investigations and the IRS concerning Subcommittee access to IRS materials. Such access was allowed the Subcommittee following a formal request by Senator McClellan. Later, on 1 August 1969, Commissioner Randolph

All of these activities are alleged to have been engaged in by the defendants, in conspiracy with Commonwealth Attorney Ratliff, for the purpose of harassing and intimidating the plaintiffs, harassing the organizations (and members thereof) with which the plaintiffs may have associated, and driving the plaintiffs out of Pike County.

As to the factual accuracy of plaintiffs' allegations, the defendants argue first that there is no evidence that any of the defendants participated in any way in the raid on the plaintiffs' house.[30] Second, they contend

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Thrower of the IRS sought permission to inspect the files of the Subcommittee with regard to certain organizations. Senator McClellan granted that request on 8 August 1969.

We granted the plaintiffs leave to lodge these recently disclosed materials with the court and invited a response from the defendants. The defendants asserted that Brick had returned the copies of 234 documents to Thadeus Scott, Commonwealth Detective, on 14 August 1968 (although they were not actually returned to the McSurelys until 8 November 1968), and received a receipt for the return. According to Brick's testimony in the criminal contempt trial of the McSurelys, he never copied any of the documents, he never retained any, and the Subcommittee retained none. In sum, even if the IRS did gain access to the Subcommittee's files at some point after 28 August 1968, the McSurelys could not have been harmed thereby, because no copies of their papers were in the files.

Plaintiffs, in their reply to defendants' response, dispute both that the documents were turned over to Scott on 14 August 1968 and that no copies were made. We are in no position to resolve this factual dispute. To the extent that it is material to that part of plaintiffs' case which survives our partial grant of summary judgment to the defendants, we leave resolution of this question to the District Court on remand.

[30] As rebuttal evidence, defendants point to plaintiffs' stipulation that Lavern Duffy, Assistant Counsel to the Subcommittee and its chief investigator, had no contact with Ratliff prior to their telephone conversation more than three weeks after the Ratliff raid. App. 20. Further, they point to this court's statement in *United States v. McSurely* that it was a result of that conversation that Brick traveled to Pikeville. 154 U.S.App.D.C. 141, 145, 473 F.2d 1178, 1182 (1972). Finally, in an affidavit attached to the defendants' motion for dismissal or summary judgment, Senator McClellan flatly denied any participation of any sort in the raid. App. 60-61.

that none of the 234 copies of documents taken to Washington by Brick was shown to anyone, inside or outside the Subcommittee, except Senator McClellan. The copies were kept in a locked file until returned to the McSurelys. No evidence has been submitted by the plaintiffs to the contrary.

As we noted above, however, this court is not equipped to resolve the factual disputes raised by the pleadings. If this appeal were one taken by the plaintiffs from a grant of summary judgment in favor of the defendants, we might be disposed to find that the plaintiffs had not met their burden of setting forth "specific facts showing that there is a genuine issue for trial."[31] In view of the great deference due the District Court's apparent determination that none of

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[31] Fed.R.Civ.P. 56(e) provides in pertinent part that a party opposing a summary judgment motion supported by affidavits "may not rest upon the mere allegations . . . of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, *if appropriate*, shall be entered against him." (Emphasis added.) Plaintiffs did not file any cross-affidavits in response to the defendants' motion. Nevertheless, trial court judges are given wide latitude in determining whether entry of summary judgment in a particular situation is "appropriate." 10 C. Wright & A. Miller, Federal Practice and Procedure 719-22 (1973). Particularly in a case such as this, where the plaintiffs have not had an opportunity to take discovery, it would appear within the District Court's discretion to refuse to grant the defendants' request for resolution of all material factual issues in their favor.

these critical factual questions can be answered without further inquiry, however, we must proceed on the assumption that they remain open issues.

As to the legal merit of the plaintiffs' case, the defendants do not contest that they might be liable for damages if they in fact promoted or participated in the unlawful raid on the McSurelys' home. Generally, however, with regard to the rest of the plaintiffs' allegations, the defendants contend (1) they are immune from liability, and inquiry, under the Speech or Debate Clause and (2) their acts were not unlawful, particularly in view of the Supreme Court's recent decision in *United States v. Calandra.*[32]

IV. *The Speech or Debate Clause*

A. *General Principles*

"Without exception, our cases have read the Speech or Debate Clause broadly to effectuate its purposes," wrote Chief Justice Burger for the Court most recently in *Eastland v. United States Servicemen's Fund.*[33] The rationale behind the Court's liberal construction of the provision was explained in *Gravel v. United States*[34] as follows:

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[32] 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974).

[33] 421 U.S. 491, 501, 95 S.Ct. 1813, 1820, 44 L.Ed.2d 324, 43 U.S.L.W. 4635, 4638 (1975).

It should be noted that the Speech or Debate Clause is the federal embodiment of the common law immunity that is accorded legislators; the common law immunity is applicable to state legislators and is specifically enumerated in most state constitutions. *See Tenney v. Brandhove,* 341 U.S. 367, 372-75, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).

[34] 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d. 583 (1972).

> The Clause also speaks only of "Speech and Debate," but the Court's consistent approach has been that to confine the protection of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view. Committee reports, resolutions, and the act of voting are equally covered; "[i]n short, . . . things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson,* 103 U.S. 168, 204 [26 L.Ed. 377] (1881), quoted with approval in *United States v. Johnson,* 383 U.S. [169], at 179 [86 S.Ct. 749, 15 L.Ed.2d 681] [1966]. Rather than giving the clause a cramped construction, the Court has sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator.[35]

The Court explained further in *United States v. Brewster*:[36]

> It is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts.[37]

Moreover, in both *Gravel* and *Doe v. McMillan,*[38] the Court made clear that for the purpose of construing the constitutional provision a Member of Congress and his agent or assistant are to be " 'treated as one.' "[39]

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[35] *Id.* at 617-18, 92 S.Ct. 2614.

[36] 408 U.S. 501, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972).

[37] *Id.* at 525, 92 S.Ct. 2531.

[38] 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1973).

[39] 408 U.S. at 616, 92 S.Ct. 2614.

(That is, a Congressional aide is included within the scope of immunity afforded by the Speech or Debate Clause to the extent that his conduct would be a privileged "legislative act" if performed personally by a Congressman.)[40] Finally, any question as to whether the Clause protects equally against private civil actions as well as criminal prosecutions was laid to rest recently in *Servicemen's Fund*,[41] where the Court emphasized that both types of proceedings could be used "to delay and disrupt the legislative function. . . . We reaffirm that once it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference."[42]

The Speech or Debate Clause, then, provides protection to Members of Congress and their aides who are engaged in the process of legislating. It is a functional immunity, extended whether or not their acts are in fact motivated by the desire to forward Congress' business. The critical analytical question posed in the cases outlined above is how expansive a definition to give the "legislative sphere." All four decisions are clear that Members of Congress are completely im-

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[40] In the instant case, then, the activities of defendants Adlerman, O'Donnell, and Brick must be evaluated as if Senator McClellan himself had played their parts. If he would be immune from both inquiry and liability they are similarly immune. (No distinction is drawn here between "official immunity," as that term is applied to executive and judicial employees, and immunity under the Speech or Debate Clause. In this situation, their reach is coextensive. *See Doe v. McMillan*, 412 U.S. 306, 324, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1973).)

[41] 421 U.S. 491, 95 S.Ct. 1813, 44 L.Ed. 324, 43 U.S.L.W. 4635 (1975).

[42] *Id.* at 503, 95 S.Ct. at 1821, 43 U.S.L.W. at 4639.

munized from inquiry into their acts of speaking and voting during committee and House proceedings."[43] A Senator may maliciously libel a private citizen on the floor of the Senate for purely personal reasons; nevertheless, his speech will be protected.

Further, under *Doe v. McMillan*, the acts of authorizing a Congressional investigation pursuant to which sensitive materials involving named individuals are gathered, holding hearings where the materials are presented, preparing a report where they are reproduced, and authorizing the publication and distribution of the report, all are fully protected by the Speech or Debate Clause.[44] Even though their identification could have proven highly damaging to the children involved, and the inclusion of their names in the committee's report might not have appeared "even remotely useful" to the legislative purpose of the committee's investigation,[45] the activity of the committee members and their employees in *Doe* was of a kind generally engaged in by legislators and essential to the legislative function. It followed, therefore, that regardless of the Court's ability to conceive a rational purpose for procuring and circulating within Congress the identities of those children, under the Speech or Debate Clause this activity was fully protected.

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[43] *See also United States v. Johnson*, 383 U.S. 169, 86 S.Ct. 749, 15 L.Ed.2d 681 (1966), and *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).

[44] 412 U.S. at 313, 93 S.Ct. 2018. It bears emphasizing that Congressmen, their staff, consultants, and committee investigators alike are equally protected under the Speech or Debate Clause, as applied in *Doe v. McMillan*, for such "legislative acts."

[45] *Ibid.*

The recent *Servicemen's Fund* decision, following *Doe's* lead, emphasizes even more strongly:

> [T]he power to investigate is inherent in the power to make laws because "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *McGrain v. Daugherty*, 273 U.S. 135, 175 [47 S.Ct. 319, 329, 71 L.Ed. 580] (1927).... To conclude that the power of inquiry is other than an integral part of the legislative process would be a miserly reading of the Speech or Debate Clause in derogation of the "integrity of the legislative process." *United States v. Brewster*, 408 U.S. 501, 545–546, [92 S.Ct. 2531, 2553–2554, 33 L.Ed.2d 507] (1971); and *United States v. Johnson*, 383 U.S. 169, 172 [86 S.Ct. 749, 751, 15 L.Ed.2d 681] (1966).[46]

The Court determined, in light of the above, that the issuance of a subpoena by a Congressional committee pursuant to an authorized investigation was an activity well within the "legislative sphere" and fully protected by the Speech or Debate Clause. This latest opinion of the Court is in keeping with its earlier decision in *Dombrowski v. Eastland*,[47] where the Court held wholly immunized from inquiry the role played by the Chairman of the Senate Internal Security Subcommittee in issuing and executing a subpoena for materials which had been unlawfully seized from the petitioners therein by Louisiana state authorities.[48]

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[46] 421 U.S. at 504, 95 S.Ct. at 1822, 43 U.S. L.W. at 4639-40.

[47] 387 U.S. 82, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967).

[48] 387 U.S. at 84, 87 S.Ct. 1425. It should be noted here that *Dombrowski* contains language which appears to support a distinction between the degree of Speech or Debate Clause protection afforded Congressmen, on the one hand, and their aides, on the other. 387 U.S. at 85, 87 S.Ct. 1425. *See also Tenney v. Brandhove*, 341 U.S. 367, 378, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). The Supreme Court in *Gravel*, however, made clear that no such distinction had ever been made part of a holding by the court, and expressly disapproved this differentiation. 408 U.S. 620-22, 92 S.Ct 2614.

Although the Supreme Court has not expressly articulated the principle, it would appear impossible to subpoena materials relating to an investigation without first obtaining enough information to know to whom, where, and for what the subpoena should be directed. The gathering of such information, whether in preparation for a subpoena, an investigatory hearing, or a legislative report seems an integral part of Congress' investigative function and entitled to the same protection as the use of that information within Congress. The Supreme Court held the complaint in *Doe* barred by the Speech or Debate Clause not only as to the committee members and staff who utilized the sensitive materials in question but also as to the investigator who procured those materials." There was no suggestion that any distinction could, or should, be made for the purpose of immunity between his investigation and their utilization of its product for the purposes of conducting a broal-based legislative inquiry.

This does not mean a Member of Congress or Congressional employee is free to use every conceivable means, whether lawful or not, to obtain investigatory materials, without fear of prosecution or civil suit. The Supreme Court in *Gravel v. United States* held a

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[49] 412 U.S. at 312, 93 S.Ct. 2018.

Senator and his aide immune from questioning concerning their investigatory acts in preparation for a subcommittee hearing—*except* insofar as those acts were criminal or related to third-party crime.[50] Also, *Dombrowski v. Eastland* indicates that the Speech or Debate Clause will not protect a Member or employee of Congress from suit under the Fourth Amendment if he actively engages in an unlawful search and seizure in order to obtain information.[51] As with the charge of taking a bribe involved in *United States v. Brewster,*[52] a burglary (to take one example) can be "no part of the legislative process or function; it is not a legislative act."[53] If Congressional investigators are to take advantage of the immunity afforded by the Speech or Debate Clause, therefore, they must use lawful investigative means to obtain their information.

The only other requirement placed upon Congressional investigators (and, for that matter, Members of Congress involved in investigative activity) as a prerequisite to their invocation of Speech or Debate Clause protection is that their investigation be within the jurisdiction of Congress and their particular committee. The Supreme Court early emphasized, however, in the seminal case of *Tenney v. Brandhove,*[54] that the prerogative of the judiciary to determine this question was extremely limited.

The courts should not go beyond the narrow confines

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[50] 408 U.S. at 628-29, 92 S.Ct. 2614.

[51] 387 U.S. at 84-85, 87 S.Ct. 1425.

[52] 408 U.S. 501, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972).

[53] *Id.* at 526, 92 S.Ct. at 2544.

[54] 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).

> of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive.[55]

Thus, it matters not that the true purpose behind a committee's use of its investigative power is to ridicule, harass, or punish a private citizen.[56] So long as the particular investigative activity does not trench upon Executive or judicial prerogatives—so long as it remains facially legislative in character—the committee, and its employees, are protected.

Most recently, the Supreme Court in the *Servicemen's Fund* case reiterated, and further elucidated, this principle. The Court observed first:

> Although the power to investigate is necessarily broad it is not unlimited. Its boundaries are defined by its source. *Watkins v. United States,* 354 U.S. 178, 197 [77 S.Ct. 1173, 1184, 1 L.Ed.2d 1273] (1957). Thus, "the scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitu-

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[55] *Id.* at 378, 71 S.Ct. at 789.

[56] Investigations, whether by standing or special committees, are an established part of representative government. Legislative committees have been charged with losing sight of their duty of disinterestedness. In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.
Id. at 377-78, 71 S.Ct. at 789 (footnote omitted).

tion." *Barenblatt v. United States,* 360 U.S. 109, 111 [79 S.Ct. 1081, 1085, 3 L.Ed.2d 1115] (1959); *Sinclair v. United States,* 279 U.S. 263, 291–292 [49 S.Ct. 268, 271, 73 L.Ed. 692] (1929). We have made it clear, however, that Congress is not invested with a " 'general' power to inquire into private affairs." *McGrain v. Daugherty,* 273 U.S. [135], at 173 [47 S.Ct. 319, at 328]. The subject of any inquiry must be one "on which legislation could be had." *Id.,* at 177 [47 S.Ct. 319, at 330].[57]

Following this principle, the Court determined that the particular subcommittee investigation at issue in that case concerned a subject "on which legislation could be had" by virtue of the broad grant of investigative authority the subcommittee had received under a specific Senate resolution.[58] The Court then turned to the question of the propriety, under the subcommittee's grant of authority, of making the Servicemen's Fund a subject of investigation and subpoena. After emphasizing the narrowness of this question, the Court concluded:

> Inquiry into the sources of funds used to carry on activities suspected by a Subcommittee of Congress to have a potential for undermining the morale of the armed forces is within the legitimate legislative sphere. . . . [I]n light of the Senate authorization to the Subcommittee to investigate "infiltraion by persons who are or may be under the control of foreign governments," . . . it is clear that the subpoena to dis-

[57] 421 U.S. at 504, 95 S.Ct. at 1822, 43 U.S. L.W. at 4639 n. 15.

[58] *Id.* at 506, 95 S.Ct. 1813, 43 U.S.L.W. at 4640.

> cover USSF's bank records "may fairly be deemed within [the Subcommittee's] province." *Tenney v. Brandhove, supra.*[59]

Thus, even though the subcommittee's actual purpose may have been to harass the Servicemen's Fund and its contributors for their political beliefs, so long as it appeared possible that contacts with foreign governments might be uncovered in the Fund's bank records, the Court would not—indeed, could not—countenance judicial interference with the subcommittee's investigation.[60]

At first blush, there may appear to be a dichotomy between the position taken by the Supreme Court in *Tenney v. Brandhove* and the *Servicemen's Fund* case and that adopted in *Doe v. McMillan.* In *Doe* the Court refused to question whether any rational legislative purpose could be served by procuring and utilizing within Congress the identities of school children about

[59] *Ibid.*

[60] The foregoing synopsis of the case law surrounding the Speech or Debate Clause reveals only one significant difference between its application to such legislative functions as speaking or voting on the floor of a chamber or in a committee session and its application to such investigatory legislative functions as preliminary information gathering and exercises of the subpoena power. Speaking and voting in Congress are per se protected legislative acts. For the purposes of the Speech or Debate Clause, there can never be any question whether a particular speech or vote is within Congress' jurisdiction. Congressional investigative activities—*e. g.*, holding hearings, issuing subpoenas, sending investigators into the field to gather information—on the other hand, may lose their protected status if no conceivable legislative purpose can be found for those activities in a particular case. Because this "jurisdictional" exception runs directly against the grain of Speech or Debate Clause immunity, it is very narrowly construed, and has never been found applicable by the Supreme Court.

whom derogatory reports had been written. There was no question in that case, however, that the subcommittee had a facially legitimate purpose in directing its investigation toward the problems, including the particular suspension and disciplinary problems, of the public school system of the District of Columbia. It seems clear that this is all that *Tenney* and *Servicemen's Fund* require.[61] It would appear impossible for the courts to make detailed assessments of the propriety of each individual item of information obtained from a particular source by Congressional investigators, or revealed at a Congressional hearing, without engaging in exactly the kind of inquiry into motives that the Speech or Debate Clause was intended to foreclose.

We will examine the relevance of this question to the investigatory activity involved in the instant case in Subpart B. First, however, it is necessary to note an area where Congressmen and their staff are active—*viz.*, the dissemination of information obtained pursuant to a Congressional investigation—which the Supreme Court nevertheless has held outside the "legislative sphere" and, therefore, unprotected by the Speech or Debate Clause.

The Supreme Court made clear in *Doe v. McMillan* that the decision of a Congressional committee to include in its report information about individual citizens which might prove highly damaging to their reputations and careers was a protected "legislative act," even if such information was not "even remotely use-

[61] *Cf. Gravel v. United States*, 408 U.S. 606, 610 n.6, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972).

ful" to the committee's investigation.[62] That report could be "distributed to and used for legislative purposes by Members of Congress, congressional committees, and institutional or individual legislative functionaries" without losing its immunity.[63] The Court stressed, however, that the protection of the Speech or Debate Clause could *not* be invoked by Government authorities who published and distributed that report outside legislative channels. Whether acting with authorization from Congress or not, those who disseminated otherwise actionable material to the public at large would be required to "respond to private suits to the extent that others must respond in light of the Constitution and applicable laws."[64]

Emphasizing that not everything a Member of Congress might regularly do is a "legislative act," the Court observed:

> Members of Congress may frequently be in touch with and seek to influence the Executive Branch of Government, but this conduct "though generally done, is not protected legislative activity." [Cite] Nor does the Speech or Debate Clause protect a private republication of documents introduced and made public at a committee hearing, although the hearing was unquestionably part of the legislative process. *Gravel v. United States, supra.*[65]

In sum, even if Congress' use of material injurious to private reputation is protected for the purpose of issu-

[62] 412 U.S. at 313, 93 S.Ct. 2018.
[63] *Id.* at 312, 93 S.Ct. at 2024.
[64] *Id.* at 316, 93 S.Ct. at 2026.
[65] *Id.* at 313-14, 93 S.Ct. at 2025.

ing subpoenas, writing reports, and deliberating on legislation, the immunity afforded by the Speech or Debate Clause ceases if that material is disseminated either to the Executive or to the public at large.

B. *Application of Law to Facts*

The preceding outline of the case law surrounding the Speech or Debate Clause makes clear that, as a general rule, the process of gathering and utilizing information within Congress is protected activity within the "legislative sphere." Constitutional immunity may be withdrawn, however, if no rational legislative purpose can be found for a committee's action in directing its investigation toward a particular individual, organization, or institution. Also, the Speech or Debate Clause will not shield an employee or Member of Congress from prosecution or suit for a crime or Fourth Amendment violation arising from his efforts to obtain information. Finally, the dissemination of information outside of Congress is not a protected legislative act and enjoys no special constitutional immunity.

The question whether the Subcommittee on Investigations in the instant case was engaged in investigative activity concerning matters "on which legislation could be had" is readily answered. At all times pertinent to the case, the Subcommittee was authorized by Senate Resolution

> to make a full and complete study and investigation of violent disturbances of the peace [and] . . . civil and criminal disorder . . ., the commission of crimes in connection therewith, the[ir] immediate and long-standing causes, the extent and effects of such occurrences and crimes[,] and measures necessary for their immediate and long range prevention.[66]

At the time of John Brick's inspection of the McSurely materials, the Subcommittee had embarked on its investigation into riots; a riot had occurred in Nashville, Tennessee, on 8 and 9 April 1967; the Subcommittee suspected the riot was instigated by persons holding positions in national organizations active in political protest; the McSurelys attended a meeting of the Southern Conference Educational Fund in Nashville immediately before the April 1967 riot; and Commonwealth Attorney Ratliff advised Brick prior to Brick's examination of the seized material that it contained references to that meeting. Certainly, there is no question, in view of the breadth of Congress' investigatory power and of its mandate to the Subcommittee, that the Subcommittee had jurisdiction to send Brick to Pikeville to examine the materials in Ratliff's possession.

Moreover, Brick clearly enjoyed the prerogative—so long as he did not obtain the documents by unlawful means—to bring to Washington copies of all materials which might prove useful to the Subcommittee's investigation. The primary dispute in this case, focused upon by our colleague's partial dissent, arises from Brick's testimony at the McSurely contempt trial that not all of the batch of 234 documents he received from Ratliff—in the selection of which Brick had played no part—were necessary to the investigation.[67] Neverthe-

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[66] S.Res. 150, 90th Cong., 1st Sess. (11 August 1967); S.Res. 216, 90th Cong., 2d Sess. (15 March 1968); S.Res. 26, 91st Cong., 1st Sess. (17 February 1969).

[67] R. 726-39. The *only* such document specified by the McSurelys

less, rather than attempt a document-by-document determination of which items might or might not be relevant, he carried all the papers to Washington for the Subcommittee's inspection. *The question posed here is whether it was incumbent on Brick either to separate out those papers which were clearly not required for the investigation or forfeit his protection*

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in their contempt trial or in the instant case is a letter—characterized by the McSurelys as a "love letter"—to Mrs. McSurely. Despite the dissent's reference to "letters," "papers," "material," "documents," only one letter, addressed to "Dearest Cucumber" from Drew Pearson, has ever raised an issue here. (That among the 234 items were "some personal letters" creates no presumption that these were irrelevant to the committee's inquiry merely because they were "personal," nor has it been so argued; the argument has been about the one specific letter.) At oral argument before this court, counsel for the McSurelys revealed that this letter, upon whose character they stake so much, was destroyed by Mrs. McSurely (along with the copy Brick had taken to Washington) upon its return to her.

A great deal of the argument of the McSurelys, as well as the position of our dissenting colleague, rests upon this one so-called "love letter." Rarely has a single document—which we discovered to be now nonexistent—been mentioned so often in brief and oral argument. Yet the characterization of it as a "love letter" rests solely upon the assertion of Mrs. McSurely through her counsel; the writer is dead, Brick is dead, and according to the affidavits and Bricks' testimony the only two living people to have seen it besides Mrs. McSurely are Senator McClellan and Commonwealth Attorney Ratliff.

While the letter may have been as terribly embarrassing as Mrs. McSurley now asserts, it is perhaps not unchivalrous to point out that it was Mrs. McSurely herself who kept the letter around the house where it might have been seen by any prying eye, it is now certain that since she destroyed it, it will never be admitted into evidence, and it is also clear that the world would never have heard of this letter had it not been for the lengthy discussion of it by Mrs. McSurely's own counsel at various stages of this lawsuit. Perhaps the lady—like the dissent—protests too much.

(and, possibly, the protection of the other defendants) under the Speech or Debate Clause.

We do not believe a Congressional committee's investigatory jurisdiction can turn on this kind of detailed assessment of the relevancy of particular items garnered by employees or Members of Congress pursuant to a facially valid inquiry. The Supreme Court in a similar situation in *Doe v. McMillan* found "no authority to oversee the judgment of the Committee . . . or to impose liability on its members if we disagree with their legislative judgment."[68] It would appear that the jurisdictional requirements of the Speech or Debate Clause are met here, as in *Doe,* if a rational legislative purpose is present for investigating a particular person, organization, or institution. There is no requirement that every piece of information gathered in such an investigation be justified before the judiciary. Certainly, *Tenney v. Brandhove* and the *Servicemen's Fund* case do not go so far. Indeed, we submit that it is precisely this kind of entanglement in legislative judgments that the Supreme Court in *Doe* properly sought to avoid. In view of the intrinsically functional nature of the immunity afforded the investigative process by the Speech or Debate Clause, and the Clause's basic purpose of preventing the probing of legislative motive, we are convinced that the line must be drawn here.[69]

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[68] 412 U.S. at 313, 93 S.Ct. at 2025.

[69] Judge Leventhal, in his partial dissent, nevertheless takes the position that reviewing the relevancy of each of the documents taken by Brick to Washington would involve no second-guessing of legislative judgment. If there was no arguable basis for finding a document relevant, its retention and use by Brick or the Subcom-

In view of the facial legitimacy of the Subcommittee's investigation into the McSurelys' activities, we are barred from questioning the defendants' motives or the use they made within Congress of the information and copies of documents Brick brought back from Pikeville. If it can be shown that one or more of the defendants actually collaborated with Ratliff in the raid on the McSurelys' home, that might support a cause of action but a suit seeking damages for the protected Congressional activity of the defendants in receiving and examining the copies of the 234 documents in Washington, issuing the subpoenas in question and securing contempt citations against the McSurelys rests on a different ground altogether. As to those portions of the plaintiffs' complaint challenging these privileged acts, therefore, defendants are entitled to summary judgment as a matter of law.[70]

We noted earlier that immunity from inquiry or liability under the Speech or Debate Clause would not extend to a search and seizure perpetrated by a Member of Congress or his aide or agent in violation of the Fourth Amendment. Plaintiffs here do not flatly allege

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mittee would simply be "nonlegislative." If this were the case, however, surely the names of school children attached to disciplinary reports circulated throughout Congress as examples of the problems faced by big city schools would be facially "nonlegislative." Yet the Supreme Court in *Doe* declined, and we think properly, to even consider the question of relevancy. So long as an investigation of the disciplinary problems faced by the D.C. public schools was within the committee's jurisdiction, the information obtained—however derogatory or irrelevant—was within the "legislative sphere."

[70] *See United States v. Brewster*, 408 U.S. 501, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972); *Gravel v. United States*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972); *Hearst v. Black*, 66 U.S. App.D.C. 313, 87 F.2d 68 (1936).

that any of the defendants actually took part in the raid of 11 August 1967 on the McSurelys' home. Rather, their amended complaint asserts that "[a]t or about the time of the initial unconstitutional and illegal raids, the defendants . . . undertook a plan of action to . . . [c]ontinue the course of action undertaken by defendant Ratliff. . . ." It does not appear that the plaintiffs are charging the defendants with collaboration—except perhaps on a *post facto* attribution theory—in the raid itself; nevertheless, the defendants have so read the complaint.[71] We leave for the District Court on remand clarification of this question.

Plaintiffs' clearer argument is that Brick's examination of the illegally seized materials in Ratliff's possession was itself independently violative of the Fourth Amendment, and, therefore, not entitled to Speech or Debate Clause protection. Plaintiffs find support for their argument in language in this court's earlier opinion in *United States v. McSurely*.[72] We will discuss this question at some length in Part V below. Suffice it to say here that we conclude, under the authority of the Supreme Court's recent decision in *United States v. Calandra*,[73] that the Fourth Amendment injury suffered by the plaintiffs in this case was fully accomplished by the initial unlawful search and seizure. Brick committed no constitutional violation—indeed, no illegal act at all—in examining the materials in Pikeville.

The question which remains to be determined is whether Speech or Debate Clause protection extends to

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[71] Def.Br. at 22-23.

[72] 154 U.S.App.D.C. 141, 155, 473 F.2d 1178, 1192 (1972).

[73] 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974).

the defendants' alleged acts of distributing *outside* the Subcommittee the 234 copies of documents brought by Brick from Pikeville to Washington. It should be noted that the defendants hotly contest that these copies were ever shown to anyone, inside or outside the Subcommittee. The short answer to the legal question posed by the complaint, however, is that, under *Doe v. McMillan*, as long as the copies were disseminated only to Members of Congress or their staff, the defendants enjoy absolute immunity from inquiry.[74] This conclusion is not affected by the fact that some of the documents may have been injurious to the privacy interests of the plaintiffs and "not even remotely useful" to the Subcommittee's investigation.

At the same time, also under the authority of *McMillan* and *Gravel*, if the documents were shown to individuals outside of Congress—or even apparently to an agency of the Executive—such distribution is not entitled to Speech or Debate Clause protection.[75] It does not constitute "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings" with respect to matters before the House.[76] Thus, if in fact the copies of documents in the possession of the Subcommittee may have been made available to the Internal Revenue Service, as the plaintiffs allege, the defendants cannot evade questioning about the transaction. This does not mean, however, as will be discussed in Part V, that such a transfer would necessarily be unlawful. It

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[74] 412 U.S. at 312, 93 S.Ct. 2018.

[75] *Id.* at 315, 93 S.Ct. 2018.

[76] 408 U.S. at 625, 92 S.Ct. at 2627.

simply means that the defendants cannot interpose the Speech or Debate Clause as a defense to a private suit arising out of such activity.

V. *The Application of United States v. Calandra*

All parties in this case are agreed that the raid of 11 August 1967 on the McSurelys' home constituted an unlawful search and seizure in violation of the Fourth Amendment.[77] The Fourth Amendment applies to Congressional committees.[78] If the defendants collaborated with Ratliff in that raid, they will be liable in damages to the same extent as the Commonwealth Attorney. The defendants may not invoke the Speech or Debate Clause in this situation to immunize them from suit.

The plaintiffs, however, go a step further. They argue that the conduct of the defendants in inspecting the material after they were unlawfully seized from the McSurelys and basing subpoenas thereon was itself an independent violation of the Fourth Amendment. As authority for the proposition that Brick's examination of the documents in Ratliff's possession was independently violative of the McSurelys' constitutional rights, the plaintiffs cite a statement to that effect in this court's decision in *United States v. McSurely*.[79] Although it

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[77] The record does not disclose why the McSurelys have failed to pursue their remedy against the one defendant named in their complaint, Commonwealth Attorney Ratliff, who unquestionably took part in the raid.

[78] *See Watkins v. United States*, 354 U.S. 178, 188, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1954).

[79] Not only was the search and seizure of appellants' property by the Commonwealth officials illegal, but the subsequent search and use of that property by the Subcommittee investigator . . . vio-

seems clear that the majority in *McSurely* considered that Brick had committed an independent Fourth Amendment violation, it is not certain to what extent their view was premised on the assumption that because the original search by Ratliff was illegal, any attempt by the Subcommittee to use the fruits of that search in its investigation must be equally illegal. Certainly, under the majority's theory of the case, a finding that Brick *himself* committed an unlawful search and seizure was not necessary to its holding.[80] In any event, we are of the view that neither the principal rationale of McSurely nor the majority's statements with respect to the constitutionality of Brick's actions can be reconciled with the Supreme Court's recent landmark decision in *United States v. Calandra*.[81] After outlining the rationale of that opinion, we will apply it to the facts of the instant case.

A. *General Principles*

In *United States v. Calandra* the Supreme Court held that the exclusionary rule did not bar a grand jury

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lated appellants' constitutional right to have their property safe and secure from unwarranted inspections.
154 U.S.App.D.C. 141, 155, 473 F.2d 1178, 1192 (1972).

[80] If, as the majority reasoned, the exclusionary rule was equally applicable to legislative subpoenas and criminal prosecutions, it followed that the federal subpoenas were invalid as the fruit of an unlawful search and seizure by state authorities regardless whether the federal authorities had committed an independent Fourth Amendment violation. *See Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960).

[81] 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). The court's conclusion in *United States v. McSurely* as to the legality of Brick's inspection is not binding on the defendants here, because they were not parties to that case.

from subpoenaing Calandra in order to ask him questions based on evidence illegally seized during a search of his place of business. The Court observed first that grand juries traditionally have had broad investigatory powers.[82] Because they do not finally adjudicate guilt or innocence, they are allowed to operate "unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial."[83] To permit witnesses to invoke the exclusionary rule and insist on suppression hearings might not only halt the orderly process of an investigation but also "necessitate extended litigation of issues only tangentially related to the grand jury's primary objective."[84] In sum, the application of the rule would greatly interfere with the discharge of the grand jury's function.

Second, the Court emphasized:

> [T]he [exclusionary] rule is a judicially-created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.[85]

Noting the "speculative and undoubtedly minimal advance in the deterrence of police misconduct" which would be achieved by application of the rule in an *investigative* setting, the Court concluded that this impediment to the grand jury's function could not be justified.[86]

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[82] 414 U.S. at 343, 94 S.Ct. 613.

[83] *Id.* at 349, 94 S.Ct. at 620.

[84] *Ibid.*

[85] *Id.* at 348, 94 S.Ct. at 620.

[86] *Id.* at 351-52, 94 S.Ct. at 622.

Finally, the Court made clear that the grand jury was not empowered itself to violate an individual's constitutional rights,[87] but rejected the argument made in this connection that grand jury's questions based upon unlawfully seized evidence themselves constituted an *Independent* violation of Calandra's Fourth Amendment rights.[88]

> The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual's life. *That wrong, committed in this case, is fully accomplished by the original search without probable cause. Grand jury questions based on evidence obtained thereby involve no independent governmental invasion of one's person, house, papers, or effects, but rather the usual abridgment of personal privacy common to all grand jury questioning. Questions based on illegally obtained evidence are only a derivative use of the product of a past unlawful search and seizure. They work no new Fourth Amendment wrong.*[89]

The Supreme Court in *Calandra* did not directly address the issue whether an action for personal damages would lie against the members of a grand jury or its agents for utilizing information derived from an unlawful search and seizure. Nevertheless, the Court's reasoning, appears largely to answer the question. In

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[87] *Id.* at 346, 94 S.Ct. 613.

[88] *Id.* at 354, 94 S.Ct. 613.

[89] *Ibid.*

the first place, such an action could not be premised on a violation of the Fourth Amendment, since the Court made clear that the constitutional wrong is fully accomplished by the original unlawful search. Some other basis would have to be found for the suit, such as a statutory or common law invasion of privacy.

It would appear extremely counterproductive, however, on the one hand to grant a grand jury the right to consider and base questions on materials derived from an unlawful search and, on the other, to expose the members of the grand jury or their agents to personal liability for exercising that right. It is impossible for a prosecutor to determine whether certain materials may or may not be useful in a grand jury investigation without examining them beforehand. So long as such an examination and copying of data is conducted in the good faith belief that the information may be relevant to the grand jury's task, it is implicit in the Court's decision that this activity is within the lawful scope of the prosecutor's duty and, therefore, immune from suit. The only situation in which it would appear that an action for damages might succeed is that where an agent of the grand jury examined and retained or passed on material which he knew to be wholly unrelated to the grand jury's task.

A similar principle would seem to apply to a grand jury's decision to turn information over to another governmental entity for investigation. If, for example, the grand jury had obtained materials—whether or not originally unlawfully seized—which it determined might contain evidence of income tax evasion, those materials could be forwarded to the Internal Revenue Service for further analysis. Only if the grand jury

knew the IRS could derive no legitimate use from the materials would such a distribution be actionable.

B. *Application of Law to Facts*

The Supreme Court's reasoning in *Calandra* appears directly applicable to the instant case. If anything, a Congressional committee has even broader investigatory powers than a grand jury.[90] The primary purpose of a Congressional hearing is to gather data upon which to base policy determinations which inform the legislative process. Such wide-ranging inquiries are extremely ill-adapted to the "evidentiary and procedural restrictions applicable to a criminal trial."[91] Equally important, not only does a Congressional investigating

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[90] *See Watkins v. United States*, 354 U.S. 178, 187, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957); *Tenney v. Brandhove*, 341 U.S. 367, 377-78, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).

[91] Congress, as even its critics will agree, desperately needs information upon which to act. It has traditionally been given broad powers of investigation with which to meet that need. Unless we are to assume that Congress should remain pristine and naive, much of the data it should consider will inevitably come to its attention in thoroughly unadmirable ways.

> Whereas exclusion in the criminal area may reassure citizens in their confidence that their government's executive will be a *law abider*, denial of information to Congress will neither provide meaningful deterrence nor reassure citizens that their government's legislature will be a wordly-wise *lawmaker*. While the courts may refuse to allow their criminal processes to become tainted by eating the "fruit of the poisonous tree," it would be folly to forbid Congressional knowledge that bad apples exist and to stymie Congressional action on the basis of all information, good or bad in origin.

United States v. McSurely, 154 U.S.App.D.C. 141, 163-64, 473 F.2d 1178, 1200-01 (1972) (Wilkey, J., concurring) (footnote omitted). *See Catena v. Seidl*, 66 N.J. 32, 327 A.2d 658 (1974).

committee not finally determine guilt or innocence, but it cannot even indict an individual. It is difficult to conceive of a more inappropriate setting for protracted controversy. Over the legality of the method by which information in the hands of a committee was originally secured."[92]

Moreover, the incremental deterrent effect on police misconduct which application of the exclusionary rule to Congressional proceedings would achieve is certainly even more negligible than that which would be achieved by its invocation in grand jury proceedings. The extremely remote influence such an extension of the rule could be expected to have on police discipline simply does not justify its obvious informational and litigatory costs.[93]

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[92] [W]hatever the appropriateness of the exclusionary rule as a remedy in courts of law in a criminal trial, or perhaps in a civil action, the same rationale certainly does not apply in hearings before a Congressional committee. The objectives of a Congressional hearing and a criminal trial are so obviously widely different. The criminal trial is to determine guilt or innocence of an ndividual subject to specific accusations. The Congressional hearing is for the gathering of information, the formulation of broad conclusions, the determination of national policy—all to be embodied subsequently in legislation, if after hearings, deliberation and debate such legislation is though desirable or needed.
154 U.S.App.D.C. at 161, 473 F.2d at 1198 (footnote omitted).

[93] Not only are the *objectives* of all Congressional actions so different from those of a criminal trial in court—as different as the constitutionally designed functions of the legislative and judicial branches—but pragmatic evaluation of the *results* to be obtained demonstrates that the exclusionary rule has no application to legislative hearings.

The unwisdom of applying the exclusionary rule to Congress is clear when we examine how well its primary purpose of deterring official misconduct would be served by such an application.[12] Many respected authorities have expressed doubts that law enforcement

In sum, it would appear under *Calandra* that a Congressional committee shoud enjoy at least the same prerogative as a grand jury to use material which has been unlawfully seized. As with the grand jury, the Congressional committee may not be privileged to utilize such information if its agents have actively participated in the original unlawful seizure. Outside of that circumstance, however, a committee commits no new Fourth Amendment wrong by examining and copying documents originally unlawfully secured.

Judge Leventhal, in his partial dissent, however, argues that Brick's examination of the McSurely materials after the original unlawful seizure was itself violative of the Fourth Amendment because he knew the

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officials monitor their conduct in response to the consequences flowing from their mode to search in resulting criminal cases. [Footnote omitted] It seems even more doubtful that remote hypothetical effect on derivative Congressional use of discovered information could possibly figure significantly in these officials' motivations. [Footnote omitted] Will the "cop on the beat," or even the Commonwealth's Attorney in the mountains of Eastern Kentucky involved with the McSurelys here, alter his conduct if the exclusionary rule is applied to Congressional hearings? Enforced legislative ignorance is just too attenuated a form of discipline on the police to justify its obvious costs. [Footnote omitted]

[13] "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guarantee in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960); see also *Terry v. Ohio*, 392 U.S. 1, 12, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

154 U.S.App.D.C. at 162, 473 F.2d at 1199. There is no evidence here of the kind of extensive abuse of its prerogative to examine unlawfully obtained evidence which might justify application of the exclusionary rule to Congress by analogy to the "silver platter" doctrine. *See Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960).

materials had been unlawfully seized and because a three-judge federal court had ordered Ratliff to hold the materials in safekeeping. Certainly, after *Calandra*, the fact that Brick knew the documents had come wrongfully into Ratliff's possession could not render his own examination unlawful. That a grand jury knows its information springs from an illegal search does not prevent it from examining the fruits of that search, and basing questions thereon, in the pursuit of a lawful investigation. A Congressional committee, as we detailed above, is entitled to the same prerogative.

That Ratliff had been ordered to hold the materials in safekeeping also does not render Brick's examination violative of the Fourth Amendment. The three-judge court's order was simply a function of its finding that the materials had been unlawfully seized. There was no implication in the order that investigatory bodies which would otherwise be entitled to utilize unlawfully seized materials were barred from such utilization by the court's formal ruling. This does not mean Brick could have broken into Ratliff's office to obtain access to the materials. Such an entry would have been in violation of *Ratliff's* Fourth Amendment rights. Ratliff himself, however, invited the Subcommittee to come to Pikeville to examine the materials. He alerted the Subcommittee to the fact that the product of his search of the McSurelys' home might be relevant to its investigation.

Calandra makes clear that a grand jury or, we submit, a Congressional committee has the right in its investigatory capacity to use the product of a past unlawful search and seizure. The Supreme Court emphasized

that such use works no new Fourth Amendment wrong on the owners of the seized property. Since effective utilization of materials requires their examination, it is difficult to conceive, after *Calandra,* how the inspection by one authorized government agent of documents in the custody of another can be characterized as an unconstitutional search. The constitutional violation is completed with the original taking.[94]

Calandra's reasoning might not foreclose a common law action for invasion of privacy against an agent of the grand jury who inspects and retains documents he knows are wholly unrelated to the grand jury's task; however, we need not decide that question here. We do decide, as discussed in Part IV, that the protection accorded by the Speech or Debate Clause to legislative investigations immunizes a Congressional investigator from liability for this kind of non-criminal activity. Thus, the plaintiff's claim that Breck knowingly brought to Washington copies of papers which did not pertain to the Subcommittee's inquiry fails as a matter of law to state a viable cause of action.

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[94] As support for his view that we ought hold that Brick's examination of the materials in Radliff's custody was an unlawful search, Judge Leventhal cites language in my concurring opinion in *McSurely* to the effect that Ratliff's consent would not operate to "legalize this 'search.'" He notes that I never concluded there that Brick's actions were constitutional. The word "search" was in quotes in my opinion, however, because I did *not* consider it such. Nevertheless, the issue of the proper legal characterization of Brick's acts appeared difficult at the time, and I felt no need to decide it. Today, the Supreme Court's landmark decision in *Calandra* provides solid support for our position that an authorized investigatory body which examines and utilizes the fruit of an unlawful search and seizure—with the cooperation of the custodian—commits no Fourth Amendment violation.

We are left, then, with the allegation that the defendants may have disseminated some or all of the 234 copies of documents obtained by the Subcommittee to individuals or agencies outside of Congress—particularly the Internal Revenue Service. We noted in Part IV that such dissemination would not be protected by the Speech or Debate Clause. Nevertheless, as with a grand jury, we think a Congressional committee lawfully may forward to appropriate Executive agencies information which it believes relates to their legitimate functions—particularly in a case, such as this, where the agency has itself requested the information.[95] Dissemination to private individuals of unlawfully seized material would not, however, fall within the scope of a committee's authority. Likewise, the distribution to executive agencies of materials a committee knows has no reasonable relationship to the agencies' task might be an actionable invasion of privacy.

VI. *The Remand*

We hold, as a matter of law, that the defendants are entitled to summary judgment on all counts of the complaint relating to the inspection by Brick of the seized material, the transport by Brick of copies of 234 documents to Washington, the utilization of the information obtained by Brick as the basis for Congressional subpoenas, and be issuance of Contempt of Congress citations against the plaintiffs. We leave for the District Court on remand the determination whether the plaintiffs claim the defendants actively collaborated in the original raid on the McSurelys' home and, if so,

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[95] *See* note 29 *supra*.

whether there is sufficient evidence of such collaboration to merit a trial on that issue. Likewise, the question whether the defendants distributed copies of documents in the Subcommittee's possession to individuals or agencies outside Congress and, if made, whether such distribution was actionable, remains to be determined by the District Court in accordance with this opinion. We emphasize that at no point in the proceedings on remand, however, may inquiry be made into those activities of the defendants which we have indicated are protected by the Speech or Debate Clause.

Reversed and remanded.

LEVENTHAL, Circuit Judge (concurring in part and dissenting in part):

Judge Wilkey's opinion for the majority contains much that is analytic, reflective and insightful. It has a sweep that carries the reader along with persuasive momentum. Upon reflection, however, I must confess to a gnawing dissatisfaction with some important aspects.

I.

I do not agree with the majority's conclusion that investigator Brick's alleged actions in knowingly selecting and carrying to Washington materials which were totally unrelated to the Subcommittee's investigation (172 U.S.App.D.C. pp. ———, 521 F.2d pp. 1040–1041) come within the Speech or Debate Clause immunity and thus cannot be questioned by appellees in a court of law. In essence, the majority grants congressional investigators absolute license to examine, transport, and distribute among members of Congress and

their staff any and all personal papers no matter how private the correspondence—here it seems they included a love letter written by a nationally prominent newspaper columnist to Mrs. McSurely—or how clearly irrelevant the papers are to the pending legislative inquiry.

It is only when the actions of legislators (and their aides) fall "within the 'sphere of legitimate legislative activity' " that they are entitled to the protection of the Speech or Debate Clause which prohibits their being "questioned in any other Place."[1] I cannot accept that the knowing selection and circulation of such documents—of a private character, and not even arguably relevant to a legislative inquiry—is within the sphere of legitimate legislative activity safeguarded by the Speech or Debate Clause.[2] In my view, the majority's holding immunizing such activity invites "gratuitous injury to citizens for little if any public purpose."[3] It is at odds with the approachs adopted by the Supreme Court in mapping the contours of the Speech or Debate Clause protection.

The majority errs, I believe, by assuming that as long as the inquiry is "within the jurisdiction of Congress and [the] particular committee" (172 U.S.App.D.C. ——, 521 F.2d p. 1037) and therefore "facially legislative in character" (172 U.S.App.D.C. p. ——, 521 F.2d p. 1038), and lawful legislative means are em-

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[1] *See, e.g., Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 95 S.Ct. 1813, 1820, 44 L.Ed.2d 324 (1975), and cases cited.

[2] *Id.* at 501-503, 95 S.Ct. 1813, 1820-21.

[3] *See Doe v. McMillan*, 412 U.S. 306, 316-17, 93 S.Ct. 2018, 2027, 36 L.Ed.2d 912 (1973).

ployed, Members of Congress and their aides are immunized by the Speech or Debate Clause from all judicial scrutiny. In Brick's case, given the Subcommittee's broad mandate to investigate civil disorders, which rationally could include the McSurelys' activities relating to the April, 1967 riot in Nashville, Tennessee, the majority holds that Brick's knowing selection and conveyance of documents of a private character,[4] which was conceded by him to be irrelevant to the Subcommittee's inquiry,[5] is exempt legislative activity, provided

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[4] Among the 234 items which Brick carried back to Washington were "some personal letters," as Brick conceded to Government counsel. *See* Transcript of Proceedings, June 25, 1970, at 727-28. Appellees had focused particularly on the fact that one of these was a love letter to plaintiff Margaret McSurely from a prominent columnist (Document No. 201), because Brick's testimony at McSurelys' contempt trial establishes that he not only examined the love letter in Kentucky, took it to Washington, but also singled it out to show to Senator McClellan because it was a letter involving a person prominent nationally. (Tr. 730-31). Appellees allege that Brick "showed these private love letters to various members of the subcommittee staff and others, and made them (and the plaintiffs) an object of ridicule, derision, and ribald comment." Brief for Appellees at 7; *see* Amended and Supplemental Complaint at ¶ 18(b), 19, App. 44, 45.

[5] The transcript of the McSurely contempt trial reveals that Brick "went to Pikeville to examine the documents in the Court House." (Tr. 737). He looked through the documents and determined that there were "many" items that he "didn't need at all." (Tr. 736). The record contains the following exchange between the McSurelys' counsel, Mr. Stavis, and Brick (Tr. 734-35):

Q (Mr. Stavis): Did you tell Mr. Dotson or any of the folk with whom you met there that there was some of that stuff that you didn't think you needed?

A (Brick): Yes.

Q: Did you give it back to them?

A: No.

Q: Did you need that letter signed Dearest Cucumber or addressed, Dearest Cucumber? Mr. Bress (Government counsel): Objection. Irrelevant.

The Court: He may answer the question.

The Witness: No. Didn't you say signed Dearest Cucumber and when in fact it says addressed to Dearest Cucumber.

Mr. Stavis: No, I didn't.

The Witness: Was the question, did I need that letter?

Mr. Stavis: Yes. For the performance of your duties.

A: No, Sir.

Q: As a matter of fact, in respect to the performance of your duties, you didn't need most of the items in that list, did you?

A: Some of them.

he did not himself use illegal means in procuring the material. In the face of Brick's admission that much of the material garnered and transported to Washington was irrelevant and useless to the Subcommittee, the majority nonetheless argues that Brick could "bring to Washington copies of all materials which might prove useful to the Subcommittee's investigation" (172 U.S. App.D.C. p. ——, 521 F.2d p. 1040). The fact that Brick's actions cannot be reconciled with this justification—since he concededly knew that the materials were not relevant to the performance of his duties—is sidestepped by saying that courts may not engage in a "detailed assessment of the relevancy of particular items garnered by employees or Members of Congress pursuant to a facially valid inquiry" (172 U.S.App.D.C. p. ——, 521 F.2d p. 1041).

While I agree that the courts must tread gingerly in this area, lest they hamstring legislative investigations by second-guessing the legislators' judgment regarding the relevancy of the information sought, this case involves congressional access to information that is not arguably relevant, and was not brought to the commit-

tee on the premise that it might be relevant. The Speech or Debate Clause prohibits the judiciary from acting as the overseer of congressional investigations, but as the Supreme Court has repeatedly ruled, there are "finite limits" to this barrier to judicial review.[6] Brick's activities, in my opinion, breach those limits.

The majority acknowledges that no "distinction could, or should, be made for the purpose of immunity" between committee staff investigation and the committee members' utilization of the product of investigatory efforts. (172 U.S.App.D.C. p. ——, 521 F.2d p. 1037). Yet, inexplicably, it fashions a broader privilege for preliminary investigations than the Supreme Court, in its most recent pronouncement on the Speech or Debate Clause, found proper in the context of a subcommittee subpoena In *Eastland v. United States Servicemen's Fund*, the Court faced "the question . . . whether the actions of the petitioners [in issuing the subpoena] fall within the 'sphere of legislative activity.'"[7] It cautioned that, since "Congress is not invested with a '"general" power to inquire into private affairs,'" "[t]he subject of any inquiry always must be one 'on which legislation could be had.'"[8] In addition, it noted

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[6] *Doe v. McMillan*, 412 U.S. at 317, 93 S.Ct. 2018.

[7] 421 U.S. 491, 501, 95 S.Ct. 1813, 1820, 44 L.Ed.2d 324 (1975).

[8] *Id.* at 504, 95 S.Ct. at 1822 n.15. The Court found that the power to investigate falls within the definition of legislative acts. However, it qualified that determination, stating that, "[a]lthough the power to investigate is necessarily broad it is not unlimited. Its boundaries are defined by its source." *Id.* The Court cited with approval *Watkins v. United States*, 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957). There the Court ruled that "[t]here is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress," and

that the courts are empowered to determine whether "a committee's inquiry may fairly be deemed within its province."[9] Only if these basic standards are satisfied will the Speech or Debate Clause immunize the issuance of a subpoena.

Here the investigation of the McSurelys' activities relating to the 1967 Nashville riot "may fairly be deemed within [the] province" of the legislative subcommittee authorized by Senate Resolution to "make a full and complete study and investigation of violent disturbances of the peace [and] . . . civil and criminal disorder . . . ."[10] However, it does not follow that everything done by investigator Brick with respect to the McSurelys was privileged as "essential to legislating."[11] As the Supreme Court indicated in *Gravel v. United States*, for an activity to be "essential to legislating" it "must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters

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"there is no congressional power to expose for the sake of exposure." Id. at 187, 200, 77 S.Ct. at 1179.

[9] 421 U.S. at 506, 95 S.Ct. at 1823.

[10] See sources cited at n.66 of the majority opinion.

I assume that the broad investigation was an "adjunct to the legislative process" (as contrasted with inquiry "for the sake of exposure") (see footnote 8), in that it was a subject on which "legislation could be had" appellees' brief does not argue to the contrary and that issue is not focused for detailed consideration.

[11] *See Eastland v. United States Servicemen's Fund*, 421 U.S. at 508, 95 S.Ct. 1813, 1824; *Doe v. McMillan*, 412 U.S. at 315, 93 S.Ct. 2018; *Gravel v. United States*, 408 U.S. 606, 621, 92 S.Ct. 2614 (1972).

which the Constitution places within the jurisdiction of either House."[12] The fact that Brick seized concededly extraneous material—and it is significant that he seized "some personal letters," including at least one love letter, the one he showed to Senator McClellan—reveals his willingness to disregard privacy even in the absence of any Committee need. That takes this case out of the shield that has been developed for matter arguably within the Committee's province or related to a subject on which legislation can be had. *Eastland* indicates that had the subcommittee knowingly issued a subpoena for such intimate and totally irrelevant correspondence, its actions would not have constituted legitimate legislative activity. And measured against the definition of "legislative acts" set out in *Gravel*, I cannot see how such patently irrelevant material of a private nature can be deemed "an integral part of the deliberative and communicative processes" dealing with matters within the jurisdiction of Congress.

The improper and non-legislative nature of Brick's conduct is indicated by analogy to the authority granted by a search warrant. Where a warrant is issued that describes particular papers, objects and effects that are germane to the pending inquiry, any further seizure is clearly actionable. Other material may be inspected only for the limited purpose of determining whether it comes within the matters particularly described as authorized for seizure. Brick's examination exceeds the bounds of a threshold "search" for purposes of determining relevancy. Much like the police officer who in the course of executing a search warrant seizes ma-

[12] 408 U.S. at 625, 92 S.Ct. at 2627.

terial which he knows is not authorized by the warrant cannot be deemed to have engaged in a lawful search and seizure, certainly Brick's unauthorized, knowing selection and display of private papers beyond the scope of the subcommittee's inquiry cannot be deemed a legitimate legislative act.

A selective approach to evaluating Brick's conduct which distinguishes between his treatment of arguably relevant and other documents is consistent with and compelled by the pertinent Supreme Court decisions interpreting the Speech or Debate Clause. The majority, on the other hand, speaks of information gathering in the large as if the legitimacy of an inquiry into a particular aspect of a person's activities—here the McSurelys' possible connection with the 1967 Nashville riot—provides carte blanche to pry into any and all private affairs and to carry back and circulate irrelevant but provocative discoveries. This approach treats Brick's conduct with too broad a brush. I am simply at a loss to discern the basis for the majority's conclusion that Brick's retention and distribution of material which he had inspected and deemed unrelated to the performance of his investigatory duties is a legislative act to which the Clause applies. As Judge Wilkey points out in his discussion of the relationship between the prosecutor and the grand jury (172 U.S.App.D.C. p. ——, 521 F.2d p. 1045), there is a critical distinction between "an examination . . . of data [which] is conducted in the good faith belief that the information may be relevant" and the retention and passing on of material known "to be wholly unrelated" to the particular inquiry. If the material is not arguable relevant, however, any further actions taken by the investigator

fall outside the definition of legislative acts set forth by the Supreme Court in *Gravel*.

This is no foundation for the majority's claim (172 U.S.App.D.C. p. ——, 521 F.2d p. 1039) that "[i]t would appear impossible for the courts to make detailed assessments of the propriety of each individual item of information obtained from a particular source by Congressional investigators . . . without engaging in exactly the kind of inquiry into motives that the Speech or Debate Clause was intended to foreclose." The relevant threshold inquiry in assessing Brick's conduct is the limited and proper one approved in *Eastland*—may the material fairly be deemed within the committee's province." No probing of motive or second-guessing of legislative judgment is involved. If the material is arguably relevant to a proper committee investigation, the information gathering is privileged even if prompted by malice.[14] However, once private material was examined by Brick and there was no arguable basis for appraising them as relevant, his further actions in retaining and transporting them were non-legislative.[15] Questioning concerning those particular

[13] 421 U.S. at 506, 95 S.Ct. 1813, 1823, *quoting Tenney v. Brandhove*, 341 U.S. 367, 378, 71 S.Ct. 783, 95 L.Ed. 1019 (1950).

[14] *See Eastland v. United States Servicemen's Fund*, 421 U.S. at 508–509, 95 S.Ct. 1813, 1824; *United States v. Brewster*, 408 U.S. 501, 525, 92 S.Ct. 2531 (1972); *Tenney v. Brandhove*, 341 U.S. at 377, 71 S.Ct. 783.

[15] The investigator does not probe at his peril for "the legitimacy of a congressional inquiry" is not "defined by what it produces." *Eastland v. United States Servicemen's Fund*, 421 U.S. at 509, 95 S.Ct. at 1824. But once the material is found to be devoid of any conceivable legislative interest, further display or distribution can serve no legitimate legislative function and can have "no relation to the business before" Congress. Knowing retention and circulation of

improper acts and the basis for undertaking them would no more destroy the privilege than similar inquiries related to potentially *proper* acts of the committee and its staff in distributing relevant material to executive agencies,[16] acts of distribution which the majority agrees (172 U.S.App.D.C. pp. ————, 521 F.2d pp. 1042-1043) are not entitled to the protection of the Speech or Debate Clause.

In my view, Brick's knowing selection and transmission of private documents that are highly embarrassing and plainly unrelated to the legislative inquiry were not "essential to legislating" and thus are outside the Speech or Debate Clause immunity. I am confirmed in this position by the distinction between this case and the Supreme Court's ruling in *Doe v. McMillan*, which the majority relies upon extensively for support. In *Doe*, the Court cautioned that it had "no authority to oversee the judgment of the Committee . . . or to impose liability on its Members if we disagree with their legislative judgment."[17] The Court there declined to second-guess a committee's decision to include names of specific children and descriptions of their conduct in the record of its hearings on the public school system of the District of Columbia and in a committee report. "The report stated that these materials were included to 'give a realistic view' of a troubled school and 'the lack of administrative efforts

papers that are highly private, embarrassing and irrelevant are not legitimate legislative activity.

[16] *See Doe v. McMillan*, 412 U.S. at 316–17, 93 S.Ct. 2018; *Gravel v. United States*, 408 U.S. at 626–27, 92 S.Ct. 2614; *United States v. Johnson*, 383 U.S. 169, 172, 86 S.Ct. 749 (1966).

[17] 412 U.S. at 313, 93 S.Ct. at 2025.

to rectify the multitudinous problems there.' " [18] Since the accounts of the students' conduct questioned by the plaintiffs in *Doe* were broadly related to the subject matter of the committee's inquiry, the Court properly declined to enmesh itself in reviewing the usefulness or necessity of the degree and type of details included in the illustrative material assembled by the committee.

In contrast to the *Doe* plaintiffs, the McSurelys make no claim that names or descriptions of *arguably* extraneous activities should have been deleted by Brick or the subcommittee from documents pertinent to the Nashville disturbances. Rather they claim that material dealing with intimate subjects completely foreign to the committee's inquiry were taken back to Washington and displayed by Brick. Where, as here, the items in question are *plainly* and *unmistakably unrelated* to the congressional inquiry, no questioning of legislative judgment is necessary to determine that the boundaries of the power to investigate have been exceeded.[19]

The typical case will in all likelihood involve examination of items of arguable relevancy, where the court should stay its hand. But where, as here, investigative activity falls clearly outside the proper concerns of the legislature, it is our responsibility to give meaning to the "finite limits" of the Speech or Debate Clause by refusing to stretch its protective umbrella to this action of this investigator.

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[18] *Id.* at 308–09, 93 S.Ct. at 2022.

[19] *Cf. Eastland v. United States Servicemen's Fund*, 421 U.S. at 504–507, 95 S.Ct. 1813, 1822–23 & n.15.

II.

The majority puts it that in view of *Calandra v. United States,*[20] there is no sustainable claim of violation of the Fourth Amendment by agents of the Committee, since such a violation had been consummated by the unlawful search and seizure of the McSurelys' home by the state authorities.

It merits careful study whether and to what extent *Calandra* has application outside the functioning of the grand jury. In a grand jury, evidence is kept in confidence throughout, and there is reality to the conception that a grand jury's questioning is not an additional invasion of privacy. The general premise of legislative investigations, on the other hand, is ultimate exposure to the legislature and public of the material deemed most significant to the legislative functioning,[21] with room for confidentiality and executive sessions in preliminary examination and screening. Moreover, as the Court in *Calandra* pointed out, in the grand jury context "[t]he incentive to disregard the requirement of the Fourth Amendment solely to obtain an indictment from a grand jury is substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim." 414 U.S. at 351, 94 S.Ct. at 621. With respect to legis-

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[20] 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974).

[21] It should be noted in this regard that the majority would approve distribution to executive agencies of material relevant to executive functions (172 U.S.App.D.C. p. ——, 521 F.2d p. 1047), and *Doe v. McMillan, supra,* 412 U.S. at 317, 93 S.Ct. 2018, permits the public and press to inspect documents internally distributed within Congress, and presumably publish what they find.

lative investigations, by contrast, there is no comparable feature to negate incentive to disregard the burden and restrictions of Fourth Amendment requirements.

Assuming *Calandra* can be fully extended to congressional investigations, the majority, I fear, errs in distinguishing rigidly between a completed, albeit unconstitutional, search, and any subsequent use of the materials gained thereby. Suppose material has been constitutionally seized by state authorities. There could still be a subsequent unconstitutional taking from the state custody by federal agents, if they seize without consent, warrant, or probable cause. Even if the state authorities consent, there may still be problems—certainly if the federal authorities arranged the transfer in advance, prior to the state raid, and perhaps even if the awareness of an available "fence" contributed to an unlawful taking. These are not unlike problems pondered under the "silver platter" doctrine, when federal agents hobbled by the exclusionary rule would arrange for the use of their illegally acquired evidence by state agents and state proceedings.[22]

Moving from the abstract to the particular case, however, we have a situation here which plainly does raise serious Fourth Amendment questions, and questions of a kind which are by no means even addressed, much less disposed of, by *Calandra*.

I am concerned that the majority skirts a key question and distorts the decision of this court in the prior case of *McSurely v. United States*, 154 U.S.App.D.C.

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[22] *Compare Rea v. United States*, 350 U.S. 214, 217, 76 S.Ct. 292, 100 L.Ed. 233 (1956).

141, 473 F.2d 1178 (1972) (*McSurely I*). The majority argues that although this court in *McSurely I* found Brick's examination of the documents independently violative of the Constitution, it may be read to have done so on the ground that those documents were the "forbidden fruits" of Ratliff's initial unlawful search (172 U.S.App.D.C. p. ——, 521 F.2d p. 1043).

What the prior *McSurely* opinion says to me, however, is something quite different—that Brick's examination of the materials was an unconstitutional search and seizure because he knew that a three-judge federal district court had found that the materials were illegally seized, and had ordered Ratliff to hold the materials in *safekeeping*, and yet, without obtaining permission from either the court or the McSurelys, Brick examined them in the Court House and sent copies back to Washington. *See* 154 U.S.App.D.C. at 145-46, 154-55, 473 F.2d at 1182-83, 1191-92.[23] The

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[23] The majority in this case argues that "[t]here was no implication in the [three-judge court's protective] order that investigatory bodies which would otherwise be entitled to utilize unlawfully seized materials were barred from such utilization by the court's formal ruling" (172 U.S.App.D.C. pp. ——, 521 F.2d pp. 1046–1047).

The majority's reading of the protective order would defeat the very purpose for which it was issued. This is evident from the factual context underlying the court's order—arrests and seizures of books and other ideational matter pursuant to a statute proscribing mere advocacy of ideas as sedition, prosecutions instituted to stop organizing activities in the county by the McSurelys and their supporters, and official calls to halt federal funding for those activities. *See McSurely v. Ratliff*, 282 F.Supp. 848, 851–53 (E.D.Ky. 1967). It strains credulity that a court's "safekeeping" directive regarding illegally seized books, posters and pamphlets issued in the face of a systematic official effort to freeze, let alone chill, the exercise of First Amendment rights, *id.* at 852–53, can be read to have authorized disclosure of the impounded materials without either the court's or the McSurelys' permission.

court stated that "the conclusion is inescapable that the subpoenas issued by the Subcommittee for the production of the McSurely documents were the product of the *unauthorized* inspection and search of the documents by an agent of the Subcommittee itself." *Id.* at 154, 473 F.2d at 1191 (emphasis added). Similarly, on the next page this court described the activity "as an unlawful encroachment by the Subcommittee investigator himself upon the rights of the McSurelys under the Fourth Amendment." These statements, and two later statements,[34] make clear to me that the court was saying that since Brick had neither a warrant, subpoena, nor consent of the three-judge court or the McSurelys, and Ratliff had no authority to consent to Brick's examination, Brick committed an independent violation of the Fourth Amendment.[35]

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[34] The court was careful to make clear its conclusion that Brick's examination constituted an independent constitutional violation. It stated:

> Not only was the search and seizure of appellants' property by the Commonwealth officials illegal, but the subsequent search and use of that property by the Subcommittee investigator, with the cooperation of the Commonwealth attorney, violated appellants' constitutional right to have their property safe and secure from unwarranted inspections.

And it found that "the fram[illegible]committee of the subpoenas relied upon here for co[illegible] McSurelys was based upon information derived from unconstitutional searches, both by state officials and by the Subcommittee's investigator." 154 U.S. App.D.C. at 155, 473 F.2d at 1192.

[35] While in the present case Judge Wilkey says that the ruling in the prior panel opinion that there was an unconstitutional search by the subcommittee's investigator was only dictum, that is simply not the thrust of the prior opinion. On the contrary, the dictum in *McSurely I* was the court's discussion of the applicability of the exclusionary rule to congressional investigations, 154 U.S.App.D.C.

Had Brick broken into Ratliff's office without a warrant, there would plainly have been an independent Fourth Amendment violation. Why is not the same principle applicable where, as here, Brick knew that Ratliff was under a court decision to hold fast, for safekeeping, papers that had been illegally seized and nonetheless went through a door unlocked by Ratliff's aide to examine the materials in the courthouse. The only distinction between an unconstitutional break-in and Brick's challenged conduct is Ratliff's consent and assistance."[36] But, as Judge Wilkey noted in his concurrence in the prior *McSurely* case, Ratliff's consent cannot operate to validate Brick's search:

> It would not appear that the custodian's consent should operate to legalize this "search." Ratliff was

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at 155–57, 473 F.2d at 1192–93, which was inserted merely to counter the trial court's position, rather than being essential to the appellate holding. Moreover, Judge Wilkey's discussion of Brick's conduct in part II(B) of his concurrence, 154 U.S.App. at 164–65, 473 F.2d at 1201–02, belies his current characterization of the majority ruling as dictum. After consideration of the issue he concluded: "Rather than wander into the thicket of overfine and troubling distinctions generated by a theory of the case based on Mr. Brick's role, I would prefer to rest the decision here on a ground less likely to produce a remand in this case and less open to dangerous extrapolation in others." *Id.* at 165, 473 F.2d at 1202. The clear impression left by Judge Wilkey's concurrence is that the majority did rest, at least in part, "on Mr. Brick's role" but that Judge Wilkey preferred to reverse the conviction on "[t]he sounder ground" of the lack of pertinency of some of the subpoenaed material "to the valid subject of the legislative inquiry." *Id.* at 166, 473 F.2d at 1203.

[36] The majority writes: "Ratliff himself, however, invited the Subcommittee to come to Pikeville to examine the materials. He alerted the Subcommittee to the fact that the product of his search of the McSurelys' home might be relevant to its investigation" (172 U.S.App.D.C. p. ——, 521 F.2d p. 1047).

directed by the court to hold the papers "in safe keeping" pending appeal. D.A. Vol. II, p. 962. Since the original seizure had been declared illegal, the natural inference would be that he was holding them *for the benefit of the McSurelys,* subject to reversal on appeal. They, of course, were never notified or given a chance to voice their strong objections to the "search." See Note, Third Party Consent to Search and Seizure, 33 U. of Chicago L.Rev. 797, 812 (1966), for the argument that actual authority to consent is necessary to validate a warrantless search. See also *Stoner v. California,* 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964), which implies, *inter alia,* that the good faith belief of the official searcher that he has obtained valid consent does not validate his act.

154 U.S.App.D.C. at 164 n.23, 473 F.2d at 1201 n.23.

The majority's assertion (172 U.S.App.D.C. p. ——, 521 F.2d p. 1047) that *Calandra* permits a government agent to inspect documents "in the custody of another [government agent]" speaks too broadly, if it is taken to include possession by a government agent not in his capacity as a government agent but as a trustee for the benefit of others and their right of privacy.

The seriousness of this situation is not mitigated by the possibility that the three-judge federal court might have deemed it appropriate to honor a request from the subcommittee to permit its investigator to examine pertinent papers. Indeed, that only accentuates the gravity of the situation. Instead of acting lawlessly, the subcommittee's staff should have used proper process which in turn would have permitted the court, if it

granted the request, or the McSurelys, if their permission had been sought, to safeguard against encroachment, beyond the legitimate legislative sphere, into personal and private papers that lacked even an arguable relevance to the legislative inquiry.

Assuming *arguendo* that we must decide the Fourth Amendment question in order to decide the issue of privilege, I do not think that *Calandra* undercuts the validity of this court's prior ruling that there was a Fourth Amendment violation in Brick's searching, without legal foundation, through the materials that the three-judge federal court had sequestered as material that properly belonged to the McSurelys and had been unconstitutionally removed by the state executive officials. I would abide by the prior ruling.

But even if there was no constitutional violation, I think that Brick's action was not merely "improper" but so contemptuous of lawful writ as to be beyond the pale of what is rendered immune from judicial inquiry, in an action for damages, because it is within the general scope of "legitimate legislative activity" or "essential to lawmaking."

III.

Moving from Brick to the other defendants, plaintiffs have alleged that they were acting in concert with Brick in the actions that are pertinent. If that is so, the other defendants would not have a constitutional privilege or immunity unavailable, to Brick, their agent. Of course, an allegation is not proof. But at this stage of the case I don't think it can be said on the basis of the undisputed facts that the defendants are

constitutionally entitled to a summary judgment, which excuses them from further inquiry, even though Brick is not. Of course plaintiffs must prove their cases through evidence which "does not draw in question the legislative acts of the defendant member[s] of Congress or [their] motives for performing them." [37]

[37] *See United States v. Brewster*, 408 U.S. at 526, 92 S.Ct. at 2544, *quoting United States v. Johnson*, 383 U.S. at 185, 86 S.Ct. 749.

APPENDIX C

Alan McSURELY et al., Appellants

v.

John L. McCLELLAN, Chairman, et al.

No. 23845.

United States Court of Appeals,
District of Columbia Circuit.

Argued Jan. 15, 1970.

Decided March 26, 1970.

Before BAZELON, Chief Judge, and TAMM and LEVENTHAL, Circuit Judges.

BAZELON, Chief Judge:

Appellants here are Alan and Margaret McSurely and four organizations.[1] The McSurelys, interposing several claims under the First and Fourth Amendments, refused in March of 1969 to comply with a subpoena *duces tecum* issued by a Senate subcommittee [2] which demanded the production of documents

[1] The Southern Conference Educational Fund, the Southern Student Organizing Committee, the Student Nonviolent Coordinating Committee, and Students for a Democratic Society.

[2] The Permanent Subcommittee on Investigations of the Committee on Government Operations, United States Senate.

relating to membership in, and activities of, several organizations including those parties here.[3] The day

[3] The subpoena demanded the production of

all books, records, correspondence, documents, and other papers which are in the possession and control of Alan McSurely or Margaret McSurely or their agents and which relate to or pertain to:

(1) Meetings, from April 5 through April 8, 1967, attended by Alan McSurely and Margaret McSurely as individuals or as members or employees of Southern Conference Educational Fund or the Southern Students Organizing Committee held at Nashville, Tennessee, with members of or employees of the Student Non-Violent Coordinating Committee and/or Stokely Carmichael, prior to the civil disturbances (riots) which occurred in Nashville, Tennessee, on or about April 8, 1967;

(2) All books, records, correspondence, documents, and other papers which relate to or are concerned with present or former membership in or employment by the Student Non-Violent Coordinating Committee for the period January 1, 1964, to date;

(3) All books, records, correspondence, documents, and other papers which relate to or are concerned with the membership in or employment by the Southern Conference Educational Fund of Alan McSurely and/or Margaret McSurely;

(4) All books, records, correspondence, documents, and other papers which relate to or are concerned with membership in and the activities of Students for a Democratic Society and/or Southern Students Organizing Committee, for the period January 1, 1964, to date;

(5) All books, records, correspondence, documents, and other papers which relate to or are concerned with membership in or employment by the National Conference for New Politics and Vietnam Summer, of Alan McSurely and/or Margaret McSurely for the period January 1, 1964, to date;

(6) All books, records, correspondence, documents, and other papers which relate to or are concerned with Alan McSurely's employment by Appalachian Volunteers;

(7) All books, records, correspondence, documents, and other papers which relate to or are concerned with the employment of Alan McSurely and/or Margaret McSurely by the United Planning Organization (UPO) in Washington, D.C., for the period January 1, 1964, to date.

on which production was required—March 4, 1969[4]—appellants filed suit in the District Court, naming as defendants the members of the subcommittee and the subcommittee's chief counsel and general counsel. They sought a declaration that compliance with the subpoena was not required; a preliminary and permanent injunction to restrain the institution of criminal proceedings against the McSurelys for failure to comply with the subpoena; and damages.[5]

No further action was taken in this suit for some time.[6] Meanwhile, pursuant to a Senate resolution,[7] the McSurelys were indicted on August 20 for contempt of Congress.[8] They were arraigned on September 5. On September 18, appellants in the civil case served notice of intent to take depositions of Jerome Adlerman, general counsel to the subcommittee, and one John Brick, an employee of the subcommittee. One

[4] The McSurelys appeared before the subcommittee on March 4 and requested that the hearing be adjourned and the subpoenas vacated pending judicial determination of the legality of the subpoenas. This request was denied, and the McSurelys were ordered to produce the documents by noon of March 7, 1969.

[5] No request was made to obtain a temporary restraining order.

[6] It appears from the docket entries of the District Court that defendant John L. McClellan filed an answer to the complaint on May 19, and that defendants McClellan, Edmund S. Muskie, Karl E. Mundt, and Jerome Adlerman filed an answer to the complaint on July 22. Defendants Henry M. Jackson, Sam J. Ervin, Jr., Abraham Ribicoff, Robert P. Griffin, Charles A. Percy, Jacob Javits, and Donald F. O'Donnell appear never to have answered the complaint. The next entry, dated October 2, 1969, records a motion to stay the criminal proceedings.

[7] S.Res. No. 191, 91st Cong., 1st Sess. *See* 115 Cong.Rec. 4499–4500 (daily ed. May 1, 1969); *id.* at 4528 (daily ed. May 5, 1969).

[8] 2 U.S.C. § 192 (1964).

week later, the McSurelys filed pretrial motions in the criminal case seeking, *inter alia*, pretrial discovery by depositions and otherwise. Shortly thereafter, appellees filed in the civil case a motion to stay all proceedings pending completion of the criminal cases. A temporary stay of the civil proceedings was granted on October 7.

The motions in the criminal cases came on for hearing on November 24, at which time the District Court denied the bulk of the McSurelys' motion for discovery,[9] and their motions to dismiss the indictments. An oral motion to stay the criminal proceedings pending disposition of the civil case was likewise denied, and the trials set for January 19, 1970.[10] On December 10, the motions in the civil case were heard; and on December 18, the District Court entered an order staying all proceedings, including the taking of depositions and other discovery, until thirty days after the completion of "all appellate remedies" in the criminal cases; and denying appellants' motion to stay the criminal cases until resolution of the civil proceedings. Appellants seek relief from this order.

I.

We need not pause long over the Government's contention that we have no jurisdiction to entertain an appeal from the District Court's order simultaneously denying a stay of the criminal proceedings and staying

[9] It appears that some discovery of the grand jury minutes was allowed, and all other discovery denied.

[10] On January 16, 1970, we stayed the criminal proceedings pending our disposition of this appeal. 28 U.S.C. § 1651 (a) (1964). Judge Tamm dissented.

the civil proceedings until the criminal cases are concluded. With an exception not here relevant,[11] we have jurisdiction over appeals from "all final decisions" of the District Court.[12] The Supreme Court has adopted "essentially practical tests for identifying those judgments which are, and those which are not, to be considered 'final.' [Citations] A pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action': the touchstones of federal procedure." Brown Shoe Co. v. United States, 370 U.S. 294, 306, 82 S.Ct. 1502, 1513, 8 L.Ed.2d 510 (1962).[13] "[T]he concept of finality as a condition of review has encountered situations which make it clear that it need not invite self-defeating judicial construction." DiBella v. United States, 369 U.S. 121, 125, 82 S.Ct. 654, 657, 7 L.Ed.2d 614 (1962).

The order of the District Court in this case had "sufficient indicia of finality"[14] to render it appealable as a final decision. At the core of appellants' complaint is the claim that their rights will be irretrievably lost if the McSurelys are forced to trial on the criminal charges, regardless of the outcome. If the claim of a right to be free from prosecution is not determined before the criminal trials take place, it will be for all practical purposes lost.[15] Consequently, the order of

[11] We have no jurisdiction when a direct appeal lies to the Supreme Court. 28 U.S.C. § 1291 (1964).

[12] 28 U.S.C. § 1291 (1964).

[13] Citations and footnote omitted.

[14] Brown Shoe Co. v. United States, 370 U.S. 294, 308, 82 S.Ct. 1502 (1962).

[15] We are not suggesting, of course, that this claim may not be

the District Court amounted to a final determination of this claim, and we may therefore hear the appeal.[16] Our conclusion that the order involved is appealable in view of the nature of appellants' claims is not undercut by the fact that we do not adopt such of their contentions as we find open in the present posture of the case. Appellants present the claim that they will be subject to constitutional injury no matter what the course of events in the criminal proceeding. We have jurisdiction to consider that claim, even though we conclude, as will appear, that the criminal proceeding can be conducted so as to avoid trampling on appellants' constitutional rights.

In view of this disposition, we need not consider whether the order is appealable as the denial of a preliminary injunction, or whether relief might be available under the All-Writs Act.[17]

II.

In addition to claims regarding the construction and validity of the Senate resolutions authorizing the subcommittee's investigation,[18] appellants raise in substance four claims, any one of which, they argue, would

raised as a defense to the criminal prosecutions. *See* note 35 *infra* and accompanying text. Such a defense, if successful, would vindicate the McSurelys' right to be free from conviction, but the greater right—to be free of prosecution—could not be made whole.

[16] Woods v. Wright, 334 F.2d 369, 373–374 (5th Cir. 1964); United States v. Wood, 295 F.2d 772, 777–778 (5th Cir. 1961), cert. denied, 369 U.S. 850, 82 S.Ct. 933, 8 L.Ed.2d 9 (1962); *see* Amdur v. Lizars, 372 F.2d 103, 105–106 (4th Cir. 1967).

[17] 28 U.S.C. § 1651(a) (1964).

[18] Appellants do not appear to assert that these claims may not adequately be raised in the course of criminal prosecutions.

justify the McSurely's failure to comply with the subpoena. First, that the documents in issue were originally taken from their possession in an unlawful search and seizure by agents of the State of Kentucky;[19] that the information upon which the present subpoenas are based stems from an examination of the illegally seized documents by a staff member of the Senate subcommittee after the seizure had been declared unconstitutional; and that, therefore, the subpoena is unlawful.[20] Second, that the documents relate to membership and political activity protected by the First Amendment,[21] and that consequently, absent justification not present in this case,[22] the subpoena infringes "[the] freedom to engage in association for the advancement of beliefs and ideas," N. A. A. C. P. v. Alabama ex rel. Patterson, 357 U.S. 449, 460, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488 (1958).[23] Third, that the interplay of the First and Fourth Amendments [24] requires that, at least when production of documents is resisted on a colorable First

[19] *See* McSurely v. Ratliff, 398 F.2d 817 (6th Cir. 1968); McSureley v. Ratliff, 282 F.Supp. 848 (E.D.Ky.1967).

[20] Elkins v. United States, 364 U.S. 206, 215, 221–223, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391–392, 40 S.Ct. 182, 64 L.Ed. 319 (1920).

[21] *Cf.* Boorda v. Subversive Activities Control Board, 137 U.S. App.D.C. 207, 212, 421 F.2d 1142, (December 12, 1969).

[22] *Cf.* Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 544–546, 83 S.Ct. 889, 9 L.Ed.2d 929 (1963).

[23] *See also* Watkins v. United States, 354 U.S. 178, 196–198, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957).

[24] Stanley v. Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243, 22 L.Ed. 2d 542 (1969); Stanford v. Texas, 379 U.S. 476, 484–486, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965).

Amendment basis,[25] judicial review of the legality of the subpoena must be available before criminal liability may attach to failure to comply.[26] Fourth, that whether or not such preenforcement judicial review is available to the individuals served with the subpoena, third parties whose rights may be irretrievably lost upon compliance are entitled to press their claims either prior to the time at which criminal liability will attach to the individuals served should they fail to comply with the subpoena,[27] or at the very least in a civil proceeding before the individuals served are prosecuted for contempt, lest the third parties' rights, necessarily entrusted in criminal proceedings to the persons subpoenaed, receive inadequate protection.

For present purposes, we may assume without deciding that one or more of these claims is valid. It nevertheless appears to us that, in the circumstances of the present case, the criminal trial should be allowed to proceed. Admittedly the third and fourth claims presented by appellants, if valid, would lead to the conclusion not only that the McSurelys may not be

[25] *Cf.* A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 210, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964) (plurality opinion); Marcus v. Search Warrants, 367 U.S. 717, 730–731, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961); Kovacs v. Cooper, 336 U.S. 77, 88, 69 S.Ct. 448, 93 L.Ed. 513 (1949) (plurality opinion).

[26] *See* Speiser v. Randall, 357 U.S. 513, 525–526 (1958); *cf.* Carroll v. President and Commissioners, 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325 (1968).

[27] *Compare* Cobbledick v. United States, 309 U.S. 323, 327–328, 60 S.Ct. 540, 84 L.Ed. 783 (1940) (witness's claims of valid resistance to process not reviewable until imposition of sanction) *with* Perlman v. United States, 247 U.S. 7, 12–13, 38 S.Ct. 417, 62 L.Ed. 950 (1918) (third party's claim reviewable before time of compliance or noncompliance).

convicted for failure to comply with the subpoena, but also that prosecution itself is barred until the underlying issues have been determined. But we believe that so broad a claim is no longer open to appellants. Although the instant suit was filed on March 4, before compliance with the subpoena was required,[28] no attempt was made to obtain a temporary restraining order, and beyond the filing of the complaint appellants took no action whatsoever in the suit for almost seven months thereafter.[29] In the meantime, although the Senate, on May 5, resolved that the matter be referred to the United States Attorney for criminal prosecution,[30] appellants made no attempt to join him in the suit, or to otherwise restrain him from, *e. g.*, presenting to the grand jury the fruit of an unlawful search.[31] Even after the indictment had been filed, and the McSurelys arraigned, appellants made no attempt to halt the criminal prosecutions for almost a month.[32] Having permitted the prosecutions to proceed so far unchallenged, appellants are in a weak position to complain of injury from the mere fact of prosecution. *Cf.* United States v. Munsingwear, Inc., 340 U.S. 36, 40, 41, 71 S.Ct. 104, 95 L.Ed. 36 (1950). Finally, with respect to the possibly separate claims of the appellant organizations, we

[28] *See* note 4 *supra*.

[29] *See* note 6 *supra*.

[30] 115 Cong.Rec. 4528 (daily ed. May 5, 1969).

[31] *See* Smith v. Katzenbach, 122 U.S.App.D.C. 113, 117–120, 351 F.2d 810, 814–817 (1965).

[32] Their motion to stay proceedings in the criminal cases was filed on October 2, more than a month after the McSurelys' indictment on August 20, and almost a month after they were arraigned on September 5.

note that there has never been any hint that the McSurelys will do other than vigorously defend the rights of the organizations and their members.

We therefore conclude that appellants' claim of a right to be free from criminal prosecution may not at this stage operate to stay the criminal proceedings.[33] Nevertheless, there remains appellants' separate claim that they will be unable adequately to present their constitutional defenses in the criminal proceedings. That claim would in itself constitute a defense to the criminal charges.[34] It may well be that such a claim, if provided with an adequate foundation, would present an equitable basis for pretrial restraint of the criminal prosecution.[35] That foundation, however, must be a firm one. We do not believe that appellants may prevail on a claim like this unless they can show, without the necessity of inquiry into the likely course of decision by the criminal court, that their contentions may not be adequately presented by way of defense in the criminal trials.[36] This is similar to the standard applied

[33] That is, insofar as appellants may have a legally cognizable right to be free of the disabilities of criminal prosecution other than conviction, we believe the time for equitable enforcement of the right has passed. We would be reluctant to apply the doctrine of laches were it not for the fact that, as appellants' constitutional claims may afford a defense to the criminal charges, they are barred only from obtaining equitable relief against the mere pendency of the criminal prosecutions.

[34] Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948).

[35] *See* Cooper v. Hutchinson, 184 F.2d 119, 123–125 (3rd Cir. 1950).

[36] *Compare* Georgia v. Rachel, 384 U.S. 780, 797–806, 86 S.Ct. 1783, 16 L.Ed.2d 925 (1966).

when state criminal cases are sought to be removed to the federal courts.[37] To this question we now turn.

III.

It is clear that appellants' claims are cognizable in the criminal proceedings, and appellants do not suggest the contrary. Rather, they base their argument on the theory that, as at least one of their claims rests upon a factual foundation peculiarly within the knowledge of the subcommittee's members and staff,[38] the limited discovery procedures available in criminal cases[39] will not allow them adequate opportunity to develop the factual basis for their claim.

We do not believe that the criminal process is so limited. Restrictions upon discovery in criminal cases are directed primarily to the timing, rather than the fact of discovery itself. While a criminal defendant may not be entitled to "discover" in advance of trial the contents of the government's case, he is obviously entitled to disclosure at the time of trial of the facts bearing upon his guilt or innocence. The prosecution may not suppress evidence favorable to the accused, at

[37] With a qualification not here relevant, *viz.*, that the right be one "under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof." 28 U.S.C. § 1443(1) (1964).

[38] Appellants claim that the knowledge upon which the subpoena was based was itself illicit. Obviously, the question what if any other information was available to the subcommittee is not a question susceptible of answer by the McSurelys.

[39] *See* A. Amsterdam, B. Segal, & M. Miller, Trial Manual for the Defense of Criminal Cases §§ 265–273 (1967); 1 C. Wright, Federal Practice and Procedure §§ 241–259 (1969).

least if request is made by defense counsel for its production."[40]

We need not decide, for present purposes, whether appellants' Fourth Amendment claim[41] is a matter going to guilt or innocence or one that relates to the admissibility of evidence, an issue that may properly be raised before trial.[42] In either event, the McSurelys are entitled to call the witnesses necessary to develop the factual basis for their claim, either in pretrial proceedings or at the trial.[43] At least when constitutional claims are involved, the kind of fairness basic to criminal trials entitles defendants to reasonable continuances in order to prepare for further examination of unfriendly witnesses not previously available for interview or discovery, if their testimony requires an opportunity for preparation not possible before trial." The trial judge has flexibility to manage the trial to proceed expeditiously and avoid unnecessary delays, without sacrificing fairness.

We see no basis, therefore, for an assumption that appellants will not have an adequate opportunity to present and to develop the factual basis for, their constitutional claims, either during the criminal trials,

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[40] Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[41] *See* notes 19–20 *supra* and accompanying text.

[42] The writer of this opinion would emphasize the important consequences that decision of this question will have with regard to the burden of proof and the burden of coming forward with evidence on the matter.

[43] Washington v. Texas, 388 U.S. 14, 18–19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

" *Cf.* Townsend v. Bomar, 351 F.2d 499, 501–502 (6th Cir. 1965); Roberts v. United States, 325 F.2d 290, 292 (5th Cir. 1963).

or in further pretrial proceedings if the District Court, on reflection, considers those appropriate in light of the problems involved.

IV.

One final matter requires mention. Appellants here have sought relief not only from the denial of any stay of the criminal proceedings, but also from that portion of the District Court's order staying all proceedings, including the taking of depositions and other forms of discovery, in the civil action. The stay was to continue in effect until thirty days after final resolution, including the exhaustion of all appeals, of the criminal cases.

Of course the District Court has a broad discretion in granting or denying stays so as to "coordinate the business of the court efficiently and sensibly."[46] This discretion, however, may be abused "by a stay of indefinite duration in the absence of a pressing need."[47] Here the District Court has not advanced any reason for a stay of such potentially long duration, beyond the one implicit in the order—that some of the parties were involved in criminal proceedings raising some of the same issues. A "stay is immoderate and hence unlawful unless so framed in its inception that its force will be spent within reasonable limits, so far at least as they are susceptible of prevision and description."[47]

---

[46] Landis v. North American Co., 299 U.S. 248, 255, 57 S.Ct. 163, 166, 81 L.Ed. 153 (1936).

[47] *Id.*

[47] *Id.* at 257, 57 S.Ct. at 167.

There is undoubted appellate jurisdiction to review the grant of an indefinite stay in a civil proceeding. *See, e.g.*, Government & Civic Employees Organizing Committee v. Windsor, 347 U.S. 901,

[9-11] We are not prepared to say that the District Court's action here was unreasonable. Of course, civil discovery may not be used to subvert limitations on discovery in criminal cases, either by the government [48] or by private parties.[49] But the facts underlying this litigation are already more than two years old. Although we may expect the criminal trials to be concluded with some dispatch, final resolution of the criminal cases, including the resolution of any appeals if the McSurelys are convicted, may require considerable time. In light of the fact that one of the functions of discovery is to preserve testimony while recollection is relatively fresh, an indefinite stay of their taking should not be entered unless no alternative is available. In the present case, we have no indication that the District Court considered the possibility of more narrowly framed protective orders—as, for example, to stay discovery procedures only until the taking of evidence is concluded in the criminal cases,[50] or to limit discovery concerning certain matters to written interrogatories to be held under seal pending completion of the criminal

74 S.Ct. 429, 98 L.Ed. 1061 (1954), affirming 116 F.Supp. 354 (N.D. Ala.1953); *Landis, supra.*

[48] United States v. Parrott, 248 F.Supp. 196, 199-202 (D.D.C. 1965) (Gasch, J.).

[49] Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962), cert. denied, 371 U.S. 955, 83 S.Ct. 502, 9 L.Ed.2d 502 (1963).

[50] Just as we have considered it inappropriate, for purposes of deciding whether equitable relief should be granted against the criminal prosecutions, to speculate about the possibility that the trial judge in the criminal case will err, the writer of this opinion would likewise state that in his view, no such speculation is permissible for the purpose of deciding whether civil discovery should be postponed. And of course, unless there is error the criminal cases will be disposed of by a single trial.

trial.[51] In the interests of justice, we vacate the order staying all proceedings in the civil action, and remand the case to the District Court for further consideration consistent with this opinion.

That portion of the order of the District Court denying a stay of the criminal trials is affirmed; that portion staying all proceedings in the civil action is vacated, and the matter remanded for further consideration consistent with this opinion.

So ordered.

TAMM, Circuit Judge (dissenting):

It appears to me that the majority opinion has passed over much too swiftly and much too lightly a very real jurisdictional problem in this case. The proposition that one can appeal to the Court of Appeals a discretionary action by a district judge refusing to stay a criminal prosecution while a civil case proceeds ought not to be too readily accepted by this court. Only those actions of the trial court which threaten that rights of the appellant will be *irreparably lost* should be granted the status of a final order appealable under 28 U.S.C. § 1291 (1964). Harris v. Gibson, 322 F.2d 780 (5th Cir. 1963), cert. denied, 376 U.S. 908, 84 S.Ct. 661, 11 L.Ed.2d 606 (1964); United States v. Wood, 295 F.2d 772 (5th Cir. 1961), cert. denied, 369 U.S. 850, 82 S.Ct. 933, 8 L.Ed.2d 9 (1962).

[51] It is appropriate for the District Court to consider whether there may be means less drastic than complete denial of discovery (and the consequent perpetuation of testimony) in the civil case which will assure furtherance of justice in that case without undercutting the reasons underlying the limitation of discovery in the interrelated criminal case, *i.e.*, the possible need for precaution against perjury or intimidation of witnesses, and the principle of mutuality of discovery.

The majority relies on rather skimpy authority for its view that jurisdiction attaches in this case, citing DiBella v. United States, 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614 (1962), for the proposition that "the concept of finality as a condition of review has encountered situations which make it clear that it need not invite self-defeating judicial construction." (369 U.S. at 125, 82 S.Ct. at 657) While that is a worthy maxim, its use must be carefully circumscribed, and it should not be given self-serving judicial construction. In the *DiBella* case the Court reviewed the appealability of an order denying a pretrial motion to suppress evidence allegedly obtained through an illegal search and seizure. There the Court, even though it followed the expanded theory of finality implicit in the dictum cited by the majority here, nevertheless concluded that the denial of the motion to suppress *was not appealable* because interlocutory in nature. In amplifying the statement quoted by the majority, the Court noted that the exceptional situations which have been encountered have involved circumstances such as orders for the immediate transfer of property or appeal of an order collateral to the principal litigation which would not be affected by the decision on the merits and in which "the practical effect of the order will be irreparable by any subsequent appeal." (369 U.S. at 125-26, 82 S.Ct. at 657.)

I fail to see, although the majority sees clearly, the "sufficient indicia of finality" (p. 668 *supra*) which render this stay order reviewable, nor do I agree that if appellants' claim is not "determined before the criminal trials take place, it will be for all practical purposes

lost."[1] I cannot agree that this is the kind of case in which to find a final order reviewable under section 1291.

---

[1] Although the majority appears to base its finding of jurisdiction on the theory that substantial rights will be irreparably lost if not determined before the criminal trial takes place, such a criterion is refuted by the majority's disposition on the merits, through such diffuse statements as:

> We therefore conclude that appellants' claim of a right to be free from criminal prosecution may not at this stage operate to stay the criminal proceedings. (*Supra at* 670).
>
> It is clear that appellants' claims are cognizable in the criminal proceedings, and appellants do not suggest the contrary. (*Supra at* 670).
>
> [Appellants claim that] the limited discovery procedures available in criminal cases will not allow them adequate opportunity to develop the factual basis for their claim.
>
> We do not believe that the criminal process is so limited. (*Supra at* 670.)
>
> We see no basis, therefore, for an assumption that appellants will not have an adequate opportunity to present, and to develop the factual basis for, their constitutional claims • • •. (*Supra at* 671.)

Where, then, is the irreparable injury upon which the majority predicates jurisdiction?

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1991

SEPTEMBER TERM, 1976

Civil 516-69

ALAN MCSURELY AND MARGARET MCSURELY

v.

JOHN J. MCCLELLAN, ET AL., *Appellants*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before:

Bazelon, Chief Judge, Danaher, Senior Circuit Judge, Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges sitting *en banc*

JUDGMENT

This cause came on to be heard by the court sitting *en banc* and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, sitting *en banc*, that the judgment of the District Court on appeal herein is hereby reversed insofar as it fails to grant the motion of the federal defendants to dismiss that part of the complaint relating to the original

taking of appellees' books and papers by the Commonwealth of Kentucky authorities; that said judgment is also reversed, with directions to grant summary judgment to appellants, on those portions of the complaint that complain of the alleged use made of certain documents within Congress; that said judgment is affirmed, in part, with a remand for further proceedings, on the claim relating to the alleged dissemination of some of the documents outside of Congress; and that said judgment is affirmed, in part, by an equally divided vote insofar as summary judgment had been denied on the allegations concerning the action of Senate subcommittee investigator, John Brick, in inspecting certain documents and transporting copies of some of them to Washington D.C., prior to the issuance of a Senate Subcommittee subpoena. The case is remanded for further proceedings not inconsistent with the opinions filed herein this date.

Per Curiam
For the Court
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Date: December 21, 1976, George A. Fisher, Clerk

Opinion filed by Circuit Judge Leventhal for a majority of the Court *en banc* as to certain items; and for himself and Chief Judge Bazelon, and Circuit Judges Wright, McGowan and Robinson, for affirmance as to certain other items.

Opinion filed by Circuit Judge Wilkey for himself, Senior Circuit Judge Danaher, and Circuit Judges Tamm, MacKinnon and Robb, for reversal as to a certain aspect of the case.

Opinion filed by Senior Circuit Judge Danaher, joined by Circuit Judges Tamm, MacKinnon and Robb for dismissal of the complaint.

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ALAN MCSURELY, et al., *Plaintiffs,*

v.

JOHN L. MCCLELLAN, et al., *Defendants.*

Civil Action No. 516-69

Filed June 12, 1973, James F. Davey, Clerk.

ORDER

Upon consideration of defendants' motion to dismiss or in the alternative for summary judgment and plaintiffs' opposition thereto, the points and authorities of the parties, it is this 8th day of June, 1973,

ORDERED, that defendants' motion to dismiss or in the alternative for summary judgment be, and hereby is, denied.

/s/ WILLIAM B. BRYANT
William B. Bryant
Judge

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ALAN MCSURELY, et al., *Plaintiffs,* v. JOHN L. MCCLELLAN, Chairman, et al., *Defendants.*	Civil Action No. 516-69

Filed July 9, 1973, James F. Davey, Clerk.

ORDER

Upon consideration of defendants' motion for reconsideration of this Court's order filed herein on June 12, 1973, or alternatively, for certification pursuant to 28 U.S.C. 1292(b) and plaintiffs' opposition thereto, and upon consideration of defendants' motion for stay of discovery, it is this 6th day of July, 1973,

ORDERED, that defendants' motion for reconsideration of this Court's order of June 12, 1973, or alternatively, for certification pursuant to 28 USC 1292 (b) be, and hereby is, denied, and it is

FURTHER ORDERED, that defendants' motion for stay of discovery be, and hereby is declared moot, and it is

FURTHER ORDERED, that defendants Brick and

Alderman not be required to appear for deposition until they are physically able to do so.

/s/ WILLIAM B. BRYANT
William B. Bryant
Judge

☆ U.S. Government Printing Office: 1977—234-248/2

FILED
NOV 28 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1621

SENATOR JOHN L. MCCLELLAN, ET AL., PETITIONERS

v.

ALAN MCSURELY AND MARGARET MCSURELY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED MAY 19, 1977
CERTIORARI GRANTED OCTOBER 11, 1977

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1621

SENATOR JOHN L. MCCLELLAN, ET AL., PETITIONERS

v.

ALAN MCSURELY AND MARGARET MCSURELY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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* The opinion of the court of appeals *en banc* is reproduced as Appendix A to the petition for a writ of certiorari. The opinion of the panel is reproduced as Appendix B, a prior decision of the court of appeals as Appendix C, the judgment of the court of appeals as Appendix D, and the orders of the district court as Appendices E and F to the petition.

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CIVIL DOCKET

United States District Court for the District of Columbia

Date	Proceedings
1969	
Mar. 4	Complaint, appearance, Exhibits A thru D
May 19	Answer of deft. #1 to complaint. filed
May 20	Summons, copy (1) and (—) issued dedt. #5. ser. 6/9/69
July 22	Answer of defts. #1, 4, 7 & 10 to complaint.
Oct. 2	Motion of defts for order staying all pending and further proceedings, pending final judgment in U S A vs McSurely Criminal No. 1376-69 and Criminal No. 1377-69.
Oct. 7	Order granting defendants' application for stay of discovery, without prejudice to plaintiffs; staying discovery until further order of Court. (See order for details) (N) micro 10-8-69 McGuire, J.
Oct. 27	Answer of pltfs. to defts' motion to stay proceedings.
Dec. 9	Motion of pltfs. for leave to file supplemental complaint; exhibit; c/m 12/5/69 and motion to stay the Criminal Trial in U.S. vs. McSurely, pending determination of this action.
Dec. 18	Order granting motion of the defts. for a stay of all pending and further proceedings until 30 days after judgments become final; denying motion for leave to file a supplemental complaint without prejudice; and denying motion to stay the criminal trials in Cr. No. 1376-69 and Cr. No. 1377-69. Hart, J.
Dec. 30	Notice of appeal by pltfs. from order of 12-18-69.
1970	
Jan. 19	Certified copy of order of USCA holding on docket appellants motion for emergency relief; and staying further proceedings in District Court in Criminal Docket Nos. 1376-69 and 1377-69 and Civil Docket No. 3426-69.

Date	Proceedings
1970	
Apr. 17	Certified copy of order of U.S.C.A. that the portion of the order of District Court denying a stay of the Criminal trials is affirmed; and portion of order staying all proceedings is vacated and remanding case to District Court.
1971	
Jan. 29	Motion of plaintiffs to implement the mandate of the United States Court of Appeals, and for leave to file amended and supplemental complaint.
Feb. 22	Motion of defendants for summary judgment or in the alternative for a stay of further proceedings.
Aug. 27	Motion of plaintiff to amend and supplement complaint argued and granted. Bryant, J.
Aug. 27	Motion of defendants for summary judgment argued and denied. Bryant, J.
Aug. 27	Motion of defendants for stay of proceedings argued and taken under advisement. Bryant, J.
Aug. 30	Order denying motion of deft for summary judgment or in alternative for a stay of further proceedings. (Signed 8-27-71) Bryant, J.
Aug. 30	Order granting plaintiffs leave to file amended and supplemental complaint. (Signed 8-26-71) Bryant, J.
Aug. 30	Amended and supplemental complaint changing caption as follows; Alan McSurely and Margaret McSurely, plaintiffs vs John J. McClellan, individually, Jerome Adlerman, Donald F. O'Donnell and John Brick, each individually and as agent of the U.S. Senate Committee on Investigations of the Senate Committee on Government operation and Thomas Ratliff, individually and as sometime CommonWealth Attorney for Pike County, Kentucky, Defendants.

Date	Proceedings
1971	
Oct. 26	Motion of defts. #1, 2, 3 and 4 to dismiss or in the alternative for summary judgment; affidavit; exhibit A.
Oct. 27	Motion of defts. #2, 3 and 4 for a protective order.
Oct. 28	Motion of defts. Alderman, O'Donnell and Brick for a protective order argued and granted. Bryant, J.
Nov. 2	Order vacating notice of pltfs. to take depositions of defts. Adlerman, O'Donnell and Brick pending resolution by Court of motion of defts. to dismiss or in alternative for summary judgment. (Signed 11-1-71) Bryant, J.
1972	
Apr. 18	Memorandum of plaintiffs in opposition to motion to dismiss or in the alternative for summary judgment and further in opposition to defts. motion for a protective order; exhibit; affidavit.
1973	
June 12	Order denying motion of defendants to dismiss or in the alternative for summary judgment. BRYANT, J.
June 27	MOTION of defts for reconsideration of order of 6/12/73 or alternatively for certification.
July 5	MOTION of defts. for stay.
July 9	ORDER denying motion of defts for reconsideration of order of June 12, 1973, or alternatively for certification; declaring moot motion of defts. for stay of discovery; and directing that defts. Brick and Alderman not appear for deposition until physically able. (signed 7/6/73) Bryant, J.
Aug. 6	NOTICE of appeal by Federal defts. from orders of 6-12-73 and 7-9-73. Copies mailed to Morton Stavis and Charles N. Mason, Jr.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN McSURELY and MARGARET McSURELY, 3210 West Broadway, Louisville, Kentucky; SOUTHERN CONFERENCE EDUCATIONAL FUND, 3210 West Broadway, Louisville, Kentucky; SOUTHERN STUDENT ORGANIZING COMMITTEE, Box 6403, Nashville, Tennessee; STUDENT NONVIOLENT COORDINATING COMMITTEE, 360 Nelson Street, Atlanta, Georgia; and STUDENTS FOR A DEMOCRACTIC SOCIETY, 1608 West Madison Street, Chicago, Illinois,

PLAINTIFFS

—against—

JOHN L. McCLELLAN, Chairman, and HENRY M. JACKSON, SAM J. ERVIN, JR., EDMUND S. MUSKIE, ABRAHAM RIBICOFF, ROBERT P. GRIFFIN, KARL E. MUNDT, CHARLES A. PERCY and JACOB K. JAVITS, Members, and JEROME S. ADLERMAN and DONALD F. O'DONNELL, General Counsel and Chief Counsel, of the Permanent Subcommittee on Investigations of the United States Senate Committee on Government Operations, all maintaining office addresses at 3302 New Senate Office Building, Washington, D. C., individually and in their official capacities,

DEFENDANTS.

Civil Action
No. 516-69

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR DAMAGES

Plaintiffs, for their verified complaint, allege as follows:

I.

Parties

A. *Plaintiffs*

1. Plaintiffs ALAN McSURELY and MARGARET McSURELY, husband and wife, hereinafter sometimes referred to as the individual plaintiffs, are citizens of the United States and of the Commonwealth of Kentucky. They are staff representatives employed by plaintiff SOUTHERN CONFERENCE EDUCATIONAL FUND, INC., (SCEF). In addition, plaintiff ALAN McSURELY was, until sometime in the fall of 1967, a field organizer for The National Conference For New Politics, and a distributor of literature for Vietnam Summer, and was at one time, employed by the United Planning Organization and the Appalachian Volunteers. At all times hereinafter set forth, said plaintiffs were engaged in attempting to organize the poor and oppressed citizens, both black and white, in the coal-producing counties of Eastern Kentucky, West Virginia and Virginia, in an effort to help these citizens improve their social, political and economic conditions.

2. Plaintiff SOUTHERN CONFERENCE EDUCATIONAL FUND, INC. (SCEF) is a non-profit corporation organized under the laws of the State of Tennessee, domesticated and maintaining an office for business purposes in the Commonwealth of Kentucky, whose purpose it is to help to secure to black and white American citizens in the southern part of the United States rights guaranteed to them under the Constitution of the United States, and to end all forms of racial and economic segregation, discrimination and injustice in the interests of both the black and white citizens thereof.

3. Plaintiff SOUTHERN STUDENT ORGANIZING COMMITTEE (SSOC) is an unincorporated association of young, concerned southern college and university students dedicated to social change through the exercise of protected First Amendment rights in order to achieve a more representative democratic society. Its principal office is in Nashville, Tennessee.

4. Plaintiff STUDENT NONVIOLENT COORDINATING COMMITTEE (SNCC) is an unincorporated association maintaining an office for business purposes in

Atlanta, Georgia, and whose purpose it is to help to secure to all black citizens the rights guaranteed to them under the Constitution of the United States, and to end all forms of racial segregation and discrimination in the interest of black and white citizens throughout the United States.

5. Plaintiff STUDENTS FOR A DEMOCRATIC SOCIETY (SDS) is an unincorporated association of students organized nationally for the purpose of bringing about fundamental changes in the democratic institutions of American society by social and political action through the exercise of protected First Amendment rights. Its principal headquarters is in Chicago, Illinois, and it has local chapters on campuses of high schools, colleges and universities throughout the nation.

6. All plaintiffs sue on behalf of themselves and all others similarly situated, and, in the case of the organizational plaintiffs, on behalf of their staff, members, friends and supporters, all said classes being too numerous to bring before the court.

B. *Defendants*

7. Defendant JOHN M. McCLELLAN is a citizen of the United States and the State of Arkansas, and Chairman of the Permanent Subcommittee on Investigations of the United States Senate Committee on Government Operations, hereinafter sometimes referred to as the Subcommittee.

8. Defendants HENRY M. JACKSON, SAM J. ERVIN, JR., EDMUND S. MUSKIE, ABRAHAM RIBICOFF, ROBERT P. GRIFFIN, KARL E. MUNDT, CHARLES A. PERCY and JACOB K. JAVITS are citizens of the United States and of the States of Washington, North Carolina, Maine, Connecticut, Michigan, South Dakota, Illinois and New York, respectively, and are majority and minority members of the said Subcommittee.

9. Defendants JEROME S. ADLERMAN and DONALD F. O'DONNELL, upon information and belief, citizens of the United States and of the District of Columbia, are General Counsel and Chief Counsel respectively of the said Subcommittee.

10. All defendants are sued individually and in their official capacities.

II.

Jurisdiction

11. The jurisdiction of the Court arises under 28 U.S.C. §§ 1331, 1332, 1334(3) and (4), 2201, 2202; 42 U.S.C. 1981 *et seq.*, and under the Constitution of the United States, and in particular, under the First, Fourth, Fifth, Thirteenth, Fourteenth and Fifteenth Amendments thereto.

III.

Causes of Action

12. The counties in Eastern Kentucky, where the individual plaintiffs live and work, have an estimated 35 billion tons of coal under their rocky, mountainous surface, of which only two billion have been mined in the past 75 years. Yet ten of the twenty poorest counties in the Nation are located in said area. Pike County, the largest coal-producing county in this country, is among them. In 1967, 18,267,200 tons of coal were mined in said Pike County alone. Coal brings from $3 to $15 a ton—depending on the grade—so even at the lowest rate, $55 million worth of coal was taken from Pike County during that year. Pike County has 3500 coal miners who are not members of the United Mine Workers of America (UMW). Although Pikeville, the county seat, has a population of less than 6,000 it has more than 40 attorneys and is the headquarters of the National Independent Coal Operator's Association, Incorporated (NICOA) an association organized by one Thomas Ratliff to represent the interests of all the nonunion mine owners in the area.

13. Plaintiffs, or some of them, have, for some time, publicly opposed the NICOA and certain Pike County officials. The individual plaintiffs have called for an "overthrow of the local Court House Gang" in the county elections next November, and for the election of a slate of people's candidates who would tax the coal leaving the county at a high rate, with the resulting money being used to build good homes, hospitals, schools and roads with locally hired labor. Said plaintiffs have also publicly called for the poor people to "join hands" with the working people of Pike County in fighting their common enemy, the coal operators.

14. On the afternoon of August 11, 1967, Thomas Ratliff, the Commonwealth Attorney for Pike County, who has or once had major coal mining interests, met with Robert Holcomb, president of the Pike County Chamber of Commerce and the NICOA, the sheriff of Pike County, several members of the Fiscal Court thereof and others. At this meeting, plans were formulated for the arrest of the individual plaintiffs and one Joseph Mulloy, (then an organizer for the Appalachian Volunteers, a private, non-profit corporation dedicated to furnishing assistance to the poor people of Eastern Kentucky, West Virginia and Virginia in order to improve their economic conditions), and the seizure of their books, documents and other records. Later that same afternoon, closed hearings were held in the Pike County Court House, as a result of which arrest and search warrants were issued with respect to plaintiff ALAN McSURELY and Josephy Mulloy. At all times on August 11, 1967, and prior thereto, defendants knew that the statute on which said warrants were based, viz. KRS 432.040, had been previously declared preempted by federal legislation by the Supreme Court of Appeals of the Commonwealth of Kentucky in Braden v. Commonwealth, 219 S.W.2d 843.

15. Late on the evening of August 11, 1967, a raiding party of about fourteen men, led by said Thomas Ratliff invaded the home of the individual plaintiffs in Pikeville, Kentucky. When Ratliff discovered that plaintiff MARGARET McSURELY had once worked for plaintiff SNCC, he ordered a member of the raiding party to prepare an arrest warrant for her. After over two hours of rifling through personal belongings of the individual plaintiffs, the raiders transported them to the county jail. The same scene was repeated around one a.m. at the home of Joseph Mulloy. The raids are best described by Circuit Judge Bert Combs in an opinion later invalidating KRS 432.040:

> On the night of August 11, 1967, under authority of warrants charging seditious activity against the United States and the Commonwealth of Kentucky in violation of KRS 432.040, officials of Pike County and their deputies arrested the McSurelys and Mulloy. The officials also seized and impounded 564 loose books, pamphlets and other private and published documents

> found in the McSurelys' home. They also impounded a suitcase of clothes and several personal items which were caught up in the whirlwind of the search. 282 F.Supp. 848, 850.

16. On August 16, a plenary federal action was instituted by individual plaintiffs, SCEF, the National Conference for New Politics, and Vietnam Summer (organizations then employing Alan McSurely), seeking an injunction restraining the enforcement of the overly broad and unconstitutional anti-sedition statute and seeking the return of the seized documents and records. Joseph Mulloy filed an intervening complaint likewise seeking an injunction against the prosecution.

On August 17, a three-judge federal District Court was duly convened to hear and determine the complaint. On September 14 the three-judge court issued a permanent injunction under the authority of *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) restraining the enforcement of the state statute and the pending state criminal proceedings thereunder. It did not, however, give final relief as to the documents which had been seized under the statute. It ordered instead that the documents and other seized material be kept in the custody of the Commonwealth Attorney, Pike County, Kentucky, pending a possible appeal by the defendants-appellees. No appeal was filed from the foregoing ruling of the United States District Court.

17. On October 16, before the expiration of the time for appeal from the order of September 14, the Commonwealth Attorney for Pike County, holding the documents aforesaid by order of the District Court, was served with a forthwith subpoena *duces tecum* from the Subcommittee to produce certain documents, materials and information broadly relating to the individual plaintiffs and to membership and activities of more than thirteen civil rights and related organizations, some of which was claimed to be in the illegally seized materials. Identical subpoenas were also served upon the United States Marshal and the individual plaintiffs.

18. Plaintiffs, or some of them, on October 18, 1967, filed motions seeking the issuance of a temporary restraining order enjoining the release of the books, papers, documents, and other materials, pursuant to the aforesaid subpoena,

and also a motion for an order directing the return to the individual plaintiffs of said books, papers, documents and other materials. The United States at this point moved for leave to appear *amicus curiae* and filed a memorandum in opposition to the said motion.

19. On October 30, the three-judge District Court, without a hearing, denied the said motion and ordered that the illegally seized documents be turned over to the Subcommittee and that plaintiffs and their counsel "cooperate therewith".

20. Notice of appeal to the Supreme Court was filed—and on application for emergency relief that Court made its order dated November 10, 1967, which stayed the October 30 order conditioned upon plaintiffs' filing with the District Court within five days, objections to the validity of the subpoenas.

21. Following the November 10 order of the Supreme Court, plaintiffs filed their objections to the validity of the subpoenas. Thereafter they filed their motion for an evidentiary hearing and offer of proof. At the same time the United States filed a motion to intervene, to which was attached an affidavit by Senator McClellan and certain exhibits. The Government's motion to intervene was granted. On December 1 the United States filed an opposition to the motion for an evidentiary hearing.

22. A hearing which was in part evidentiary, was held on December 5. The parties filed two stipulations of fact, designated "Stipulation of Facts" and "Further Stipulation of Facts". These stipulations are attached hereto as Exhibits A and B.

23. Under date of December 13, the District Court made its final order which, without explanation or assignment of any reasons, ordered that the objections of the plaintiffs to the subpoenas be overruled, thereby reaffirming and making final its October 30 order denying plaintiffs' motion for the restraining order.

24. A notice of appeal to the Supreme Court of the United States, was filed from said order, and an application was thereupon made to that Court for emergency relief. On January 29, 1968, the Supreme Court made its order, as follows:

> The motion for relief presented to Mr. Justice Stewart,

> and by him referred to the Court, is granted and the order of the United States District Court for the Eastern District of Kentucky of December 13, 1967, is stayed to the extent that the seized documents shall remain in the custody of the Commonwealth's Attorney of Pike County, Kentucky, pending the perfection and disposition of the appeal by this Court.
>
> This stay is conditioned upon the filing of the record, the jurisdictional statement and the docketing of the case within fourteen days from this date and should such appeal be docketed within that time, the Solicitor General is requested to respond to such jurisdictional statement within fourteen days thereafter. In the event the appeal is so docketed, this stay is to remain in effect pending this Court's ruling on the jurisdictional aspect of the case. Should the Court summarily affirm the judgment or dismiss the appeal, this stay shall automatically expire. In the event the Court notes probable jurisdiction or postpones consideration of the jurisdiction until the hearing on the merits, this stay is to remain in effect pending the issuance of the judgment of this Court.
>
> Issuance of this stay in no way represents an adjudication that this Court has jurisdiction of an appeal from the order of the United States District Court hereby stayed.

25. A jurisdictional statement was filed with the Supreme Court pursuant to the foregoing order. However, in view particularly of the cautionary note in the last paragraph of the Supreme Court's order of January 29, 1968, a protective appeal to the United States Court of Appeals for the Sixth Circuit was filed on February 9, 1968.

26. On March 18, 1968, the Supreme rendered a *per curiam* opinion, as follows:

> The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. The stay heretofore granted is continued for 30 days in order to afford the appellants an opportunity to apply to the United States Court of Appeals for the Sixth Circuit for a stay. If such timely application is made, the stay entered by this Court shall remain in effect until the Court of Appeals acts on that application.

27. By joint motion to the said United States Court of Appeals for the Sixth Circuit, all parties agreed that the said stay would remain in effect until the determination thereby of the said appeal.

28. On July 29, 1968, the said Court of Appeals reversed the Three-Judge Court on the ground that "[T]he right of the Court to retain possession of the seized documents, which include no contraband, has expired." 398 F.2d 817, 818.

29. On November 8, 1968, in the United States Marshal's office in the Federal Building at Pikeville, Kentucky, at approximately 3:30 P.M. the illegally seized materials taken from the individual plaintiffs and Mulloy were returned to them pursuant to the aforesaid direction of the Court of Appeals.

30. As the individual plaintiffs left the Post Office, Joe Mullins, deputy United States Marshal, served them with new subpoenas issued by defendant McClellan and an attached schedule ordering them to appear before the Subcommittee at 10:30 A.M., Tuesday, January 14, 1969. See a copy of one of the subpoenas and schedule attached hereto as Exhibit C.

31. The information sought therein, with minor exceptions, is identical to the information sought in the forthwith subpoenas previously issued by defendant McClellan that were composed on the basis of information obtained by agents of the Subcommittee through inspection of documents known by said agents to have been illegally seized by state and local officials. The new subpoenas call for the production of documents, materials and information broadly relating to the membership and activities of the plaintiffs. In addition, the subpoenas seek information pertaining to the membership and activities of the following civil rights and related organizations, all of which utilized First Amendment freedoms to attain their objectives:

(a) United Planning Organization, an umbrella anti-poverty agency for Washington, D. C., that serves as the primary funding agency for all community action projects in Washington, D.C.;

(b) Appalachian Volunteers, an Office of Enonomic Opportunity project located in the States of Kentucky, Virginia and West Virginia and staffed by VISTA volunteers working among the poor in the Appalachian Mountains;

(c) Vietnam Summer was an unincorporated association maintaining an office for business purposes in the Commonwealth of Massachusetts. Its purpose was to organize the millions of Americans troubled by the War in Vietnam. At the end of the 1967 summer, Vietnam Summer ceased to function;

(d) National Conference for New Politics was an unincorporated association maintaining an office for business purposes in the City and State of New York. Its primary function was to further and advance the growth of a new politics of ordinary people who want to control democratically the decisions that effect their own lives. National Conference for New Politics ceased to function in the fall of 1967.

32. The appearance of the individual plaintiffs before the Subcommittee pursuant to said subpoenas, originally scheduled for January 14, 1969, was subsequently adjourned by defendant McClellan, first to February 25, 1969, and then to March 4, 1969.

33. On or about February 17, 1969, the Senate of the United States adopted S. Res. 26 authorizing the Committee on Government Operations to investigate the efficiency and economy of the Government. A copy of said resolution is attached herewith as Exhibit D.

34. The said subpoenas *duces tecum* were issued as a result of the unlawful conspiracy between defendants, or some of them, and the Pike County authorities involved. With full knowledge of the clear unconstitutionality of the searches and seizures of August 11, 1967, the defendants and said officials unlawfully conspired together to prevent both the individual and organizational plaintiffs from recovering the material in question for the purpose of (a) intimidating, deterring and stigmatizing them, their members, friends and supporters, (b) preventing them from pursuing their political, poverty, peace and/or civil rights activities in eastern Kentucky and elsewhere and (c) furthering its prejudgment of the causes of the civil disturbances in the black ghettoes of the United States which it was purportedly investigating.

The said subpoenas *duces tecum* were fraudulently, illegally and unlawfully structured in that (a) they were designed to and had the effect of projecting to the public at large in general and the Congress of the United States in

particular the stereotype of political, peace, poverty and civil rights organizations as being subversive, (b) they constituted a fishing expedition designed to harass, impede, intimidate and deter political, peace, poverty and civil rights, the activities of plaintiffs, their members, supporters and friends and all other individuals and organizations included therein, (c) they constituted a writ of general assistance, (d) they continued and broadened a pattern and practice of congressional criminality in investigations of political, peace, poverty, civil rights and other organizations, (e) they were part and parcel of an unlawful conspiracy between the subcommittee and the Internal Security Subcommittee of the United States Senate Judiciary Committee to harass, impede, deter and intimidate all of the organizations involved in said subpoenas *duces tecum* and the individuals associated in any way therewith, (f) they refer to organizations not in existence on January 1, 1964, the date of origin set forth therein.

35. The issuance and service of the said subpoenas *duces tecum* were designed by the Subcommittee and the defendants, or some of them, to have and did indeed have the effect of deterring, impeding, intimidating and harassing the plaintiffs as well as all of the organizations mentioned therein and others and chilling their exercise of their fundamental rights under the First Amendment to the Constitution of the United States. Moreover, the issuance and service of the said subpoenas were designed to have and did have the effect of denying to the affected organizations access to their files and records for the purposes of preventing or impeding their fulfilling their stated objectives, *inter alia*, of racial equality and freedom, the termination of American military involvement in South Viet Nam, and the organizing of poor people in the Appalachian Mountain region and elsewhere in the United States. In addition, the issuance and service of the said subpoenas were designed to have and will have the effect, unless restrained by this Court, of exposing the identities of the contributors to and the friends, members, sympathizers and supporters of the plaintiff organizations and others to intimidation, economic retaliation, terrorism and harassment, all to the end and purpose of destroying the organizations in question or their activities.

36. Plaintiffs assert that the subpoenas, the subject matter of this action, constitute a continuation of the harassment of them, solely for the reasons aforesaid, and are designed solely for the purpose of preventing plaintiffs from carrying out their activities as aforesaid and are designed further to deter other persons in the Commonwealth of Kentucky and elsewhere from engaging in like activities.

37. Plaintiffs assert that the subpoenas *duces tecum* are invalid for the reasons hereinafter set forth:

(a). The subpoenas on their face are so broad, sweeping, and lacking in particularity as to constitute an unreasonable search and seizure and thereby violate plaintiffs' rights under the Fourth Amendment to the Constitution of the United States. The subpoenas as served are in language as broad as the traditional Writs of Assistance.

(b). The subpoenas seek documents and records dealing directly with rights of the plaintiffs to freedom of expression and political association and freedom to hold opinions, and the privacy thereof, and thereby violate plaintiffs' rights under the First Amendment to the Constitution of the United States.

(c). The subpoenas are based upon knowledge wrongfully gained from an inspection of documents illegally and unlawfully seized by government officials and are therefore invalid. Agents and employees of the Senate Subcommittee have entered into a conspiracy with representatives of Pike County, Kentucky, wherein, notwithstanding knowledge on the part of all such conspirators that the seizure of documents were covertly and surreptitiously made available to the Senate Subcommittee and said conspiracy and the fruits thereof are the basis for the subpoenas since served upon plaintiffs.

(d). The records and documents referred to in the subpoenas are not relevant or material to the subject matter of any alleged inquiry by the Senate Subcommittee and the investigation sought to be made in respect to those records is beyond the scope of the said inquiry.

(e). The resolution of the United States Senate purporting to authorize the inquiry currently under way by the Senate Subcommittee does not encompass the subject matter touched upon by the subpoenas served upon the plaintiffs nor the inquiry sought to be made with respect to those

documents, nor does the said resolution authorize or empower the Senate Subcommittee to receive and act upon documents unlawfully seized by state officials and improperly turned over to staff of the Subcommittee.

(f). The resolution of the United States Senate, if it is taken as purporting to authorize the instant inquiry by the Senate Subcommittee, does not authorize inquiry into opinions, affiliations, associations, membership, or political activities generally, all being matters protected by the First Amendment, and if the said resolution were to be interpreted as encompassing such matters the same would be unconstitutional under the First Amendment in that the same would purport to authorize an unlimited and compulsory examination of witnesses in the protected areas of speech, press, association, and assembly, in violation of both the procedural requirements of due process of the Fifth Amendment and the substantive requirements of the First Amendment.

(g). The actions of the Subcommittee in the issuance of these subpoenas violate the fundamental guarantees of freedom of speech, press, assembly, association, thought, and belief, the right of citizens to petition their government for redress of grievances, and the right of citizens to be secure in their houses, person, and papers from unreasonable searches and seizures. The subpoenas of the Senate Subcommittee are overbroad and violate the due process rights of the plaintiffs. Their overbroad sweep inhibits and deters the exercise of the rights of freedom of speech, press, assembly, and association, in violation of the First Amendment. The dragnet sweep of the investigation and subpoenas and their overbreadth create a chilling effect upon the exercise of First Amendment rights by the people of the United States.

(h). The delegation of authority by the Subcommittee is so vague, ambiguous and uncertain that it cannot support or authorize any investigation of that subcommittee which may affect or deter citizens of the United States in their exercise of their rights of freedom of speech, press, assembly or association, or may threaten the security of their persons, papers, or property.

(i). The conduct of the Senate Subcommittee from the inception of its so-called investigation has demonstrated

that it is not conducting a bona fide investigation but in fact is using the instrumentality of an investigation to harass those whose views are at variance with the views of the Senate Subcommittee. The said conduct is particularly revealed in the instant case in that the action of the Senate Subcommittee has amounted to an effort to use its powers to continue a repressive prosecution by State's Attorney, Ratliff, the unlawful use of documents illegally seized by State's Attorney Ratliff, and the service of subpoenas flagrantly unconstitutional and overbroad. By its conduct aforesaid the Senate Subcommittee has made clear that it is attempting to deter persons who may disagree with it from exercising their rights under the Constitution of the United States to urge a different point of view from that asserted by the Subcommittee and to use its powers to carry out a repressive prosecution found by this court to have been unconstitutional. By reason of the conduct of the Subcommittee aforesaid it may not have the aid of this court or of the subpoena process in implementing such a program.

38. By reason of the foregoing plaintiffs have been damaged in the sum of $50,000 each.

39. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs respectfully pray that this Court

(1) issue a declaratory judgment declaring that the subpoenas *duces tecum* issued by defendants and served upon the plaintiffs ALAN and MARGARET McSURELY are unconstitutional and void, and that said plaintiffs are under no compulsion to comply therewith;

(2) issue a preliminary and permanent injunction restraining the defendants, their agents, employees, attorneys and all others acting in concert with them from instituting or seeking to institute civil or criminal proceedings against the individual plaintiffs based upon the aforesaid unlawful subpoenas;

(3) award damages against defendants in the sum of $50,000.00 to each of the plaintiffs herein, and

(4) issue such other relief as this Court may deem appropriate or necessary.

Respectfully submitted,

Philip J. Hirschkop
William M. Kunstler
1025 Thirty-third St.
Washington, D.C.

Arthur Kinoy
511 Fifth Avenue
New York, N.Y.

Morton Stavis
744 Broad St.
Newark, N.J.

Rita Murphy
Dennis J. Roberts
Harriet Van Tassel
William J. Bender

Law Center for Constitutional
Rights
116 Market Street
Newark, N.J.

EXHIBIT A

Stipulation of Facts

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for all parties hereto that:

1. Defendant Ratliff announced publicly on or about August 11, 1967, or immediately thereafter substantially to the effect that the seized material would be made available to Congressional Committees.

2. Some time shortly after the decision of this Court on September 14, 1967, Lavern Duffy, Assistant Counsel to the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations (hereinafter referred to as the McClellan Committee), telephoned defendant Ratliff and asked if he Ratliff had the aforesaid seized material in his possession. Ratliff answered in the affirmative.

3. The aforesaid telephone call represented the only contact between Mr. Duffy and defendant Ratliff.

4. On Sunday, October 8, 1967, John Brick, an investigator for the McClellan Committee, visited defendant Ratliff and Thadeus Scott, Commonwealth's Detective, and made known to them his official capacity.

5. Mr. Brick thereupon asked defendant Ratliff whether the aforesaid seized material contained any references to an alleged meeting in Nashville, Tennessee between April 5 and April 8, 1967 at which representatives of the Southern Conference Educational Fund, the Southern Student Organizing Committee and the Student Non-Violent Coordinating Committee, including Stokely Carmichael, were present. Mr. Ratliff replied in the affirmative.

6. Mr. Brick thereupon asked defendant Ratliff specifically whether there was any information in the aforesaid seized material relating to the Southern Conference Educational Fund, the Southern Student Organizing Committee, Students for a Democratic Society, the Student Non-Violent Coordinating Committee, the Progressive Labor Party, Marxist Leninist Organizations, the Communist Party, the Mississippi Freedom Democratic Party, the National Conference for New Politics, the United Planning Organization and the Appalachian Volunteers. Mr. Ratliff replied in the affirmative.

7. Mr. Brick thereupon asked defendant Ratliff whether the aforesaid seized material contained any references to other organizations, none of which are named in the subpoena involved herein. Mr. Ratliff replied in the affirmative as to some and in the negative as to others.

8. On the evening of October 8, 1967, defendant Ratliff accompanied by Mr. Scott visited Mr. Brick in the Land Mark Motel in Pikeville, Kentucky. After some discussion among the three Mr. Scott and Mr. Ratliff left Mr. Brick's room together. Mr. Scott returned some time later bringing with him a number of manila folders containing xeroxed copies of the seized documents. Mr. Scott thereupon departed from the said motel room and Mr. Brick examined the xeroxed material for approximately two hours.

9. On the morning of October 9, 1967, by prearrangement, Mr. Scott picked up Mr. Brick at the Land Mark Motel and conveyed him by automobile to the Pike County Court House. Mr. Brick brought with him the xeroxed material which Mr. Scott had furnished to him the night before and returned it to Mr. Scott. Mr. Scott and Mr. Brick, upon arrival at the Pike County Court House found Mr. Herman Dotson, Assistant Commonwealth's Attorney who opened a locked door to a room for approximately one hour.

10. On October 9, 1967, after inspecting the aforesaid seized material, Mr. Brick proceeded to the United States Post Office in Pikeville, Kentucky, where, in the Clerk's Office, he inspected the file of this action. After inspecting the said file, Mr. Brick asked the aforesaid Clerk to mail to him at his office in Washington, D. C. a copy of the final order of September 14, 1967, and of the inventory attached thereto, which documents he received several days later.

11. On October 12, 1967, Mr. Brick returned to the Pikeville County Court House where, again accompanied by Messrs. Dotson and Scott, he entered the room in which the seized material was kept and examined same for approximately four hours. For the first time, Mr. Brick took notes of the contents of the said material.

12. Mr. Brick thereupon returned to Washington, D. C., where on October 16, 1967, at the personal direction of

Senator John L. McClellan, he prepared the subpoenas involved herein. He thereupon took the said subpoenas to Senator John L. McClellan, Chairman of the McClellan Committee, with whom he had conferred on the subject matter thereof since October 6, 1967. After some discussion with Senator McClellan, four subpoenas were signed and returned to Mr. Brick for further action. True copies of said subpoenas are attached to the affidavit of Senator McClellan dated November 22, 1967. No subpoena was ever issued or addressed to plaintiff Mulloy.

13. Mr. Brick thereupon left Washington, D. C. on the evening of October 16, 1967, and arrived in Louisville, Kentucky, and after arriving in that city, served defendant Ratliff with the appropriate subpoena. Mr. Brick thereupon left Louisville, Kentucky, for Lexington, Kentucky, where, on the afternoon of October 17, 1967, he served United States Marshal Archie Craft with the appropriate subpoena. Prior to said service, Mr. Brick contacted United States District Judge, Bernard T. Moynahan, Jr., by telephone and informed him that he, Mr. Brick, was in the State of Kentucky, for the purpose of serving said subpoenas concerning the said seized material upon Messrs. Ratliff, Craft, McSurely, and Mrs. McSurely.

14. On October 18, 1967, at 8:25 a.m., Mr. Brick served Alan and Margaret McSurely with the appropriate subpoenas at their home in Pikeville, Kentucky.

15. Alan and Margaret McSurely attended a meeting of the Board of Directors of the Southern Conference Educational Fund held at the Methodist Board of Evangelism Building in Nashville, Tennessee, between April 6 and April 8, 1968. Attached hereto and made a part hereof is a copy of the minutes of said meeting as prepared by Clarice T. Campbell, Secretary.

EXHIBIT B

Further Stipulation of Facts

IT IS HEREBY STIPULATED AND AGREED by the parties represented by the attorneys below that:

1. Mr. Brick, if called upon to testify as to the sources of the information upon which the subpoenas involved herein were based, would state that, in addition to information acquired by examination of the seized materials themselves, they would include information received prior to his first contact with defendant Ratliff; some of which information has now been made public in the McClellan Committee hearings. As to that information which has not been made public, he would refuse to divulge its sources, pursuant to Rule 30 of the Standing Rules of the Senate.

2. Copies of some of the seized documents were made available to Mr. Brick prior to the issuance of the subpoenas and are presently in the possession of the McClellan Committee.

3. Without admitting the validity of inclusiveness thereof, the United States is willing to stipulate that representatives of the organizations listed in the subpoenas involved herein would testify, if called, that the purposes and programs of their organizations are as set forth in the complaint filed herein and/or the Plaintiffs' Motion For An Evidentiary Hearing and Offer Of Proof.

.....
Attorney for Department of Justice

.....
Attorney for the United States

.....
Attorneys for Plaintiffs

Dated:
December 5, 1967
Lexington, Kentucky

EXHIBIT C

United States of America

Congress of the United States

To Alan McSurely, *Greeting*:

Pursuant *to lawful authority, YOU ARE HEREBY COMMANDED to appear before the SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS of the Senate of the United States, on forthwith, 1967, at ..... o'clock ...m., at their committee room 161 Old Senate Office Building, Washintgon, D.C., then and there to testify what you may know relative to the subject matters under consideration by said committee, and produce the records set forth in Schedule A, attached hereto and made a part hereof.*

Hereof fail not, *as you will answer your default under the pains and penalties in such cases made and provided.*

To ..... to serve and return.

Given *under my hand, by order of the committee, this 16th day of October, in the year of our Lord one thousand nine hundred and sixty-seven.*

J. L. McClellan
Chairman Senate Permanent Subcommittee on Investigations of the Committee on Government Operations.

SCHEDULE A

And produce all books, records, correspondence, documents, and other papers which belong to or were subpoenaed from Alan McSurely, Margaret McSurely, and Joseph Molloy, which are in the possession of the Commonwealth's Attorney of the 35th Judicial District, Pike County, Kentucky, as designated in Order 1146 of the United States District Court, Eastern District of Kentucky, Pikeville, dated September 14, 1967, which relate to or pertain to:

(1) Meetings, from April 5 through April 8, 1967, attended by Alan McSurely and Margaret McSurely as individuals or as members or employees of Southern Conference Educational Fund or the Southern Students Organizing Committee held at Nashville, Tennessee, with members of or employees of the Student Non-Violent Coordinating Committee and/or Stokely Carmichael, prior to the civil disturbances (riots) which occurred in Nashville, Tennessee, on or about April 8, 1967;

(2) All books, records, correspondence, documents, and other papers which relate to or are concerned with present or former membership in or employment by the Student Non-Violent Coordinating Committee for the period January 1, 1968, to date;

(3) All books, records, correspondence, documents, and other papers which relate to or are concerned with the memebrship in or employment by the Southern Conference Educational Fund of Alan McSurely and/or Margaret McSurely;

(4) All books, records, correspondence, documents, and other papers which relate to or are concerned with the membership in or employment by Marxist-Leninist organizations and/or the Communist Party, of Alan McSurely and/or Margaret McSurely;

(5) All books, records, correspondence, documents, and other papers which relate to or are concerned with membership in and the activities of the Progressive Labor Party, Students for a Democratic Society, Southern Students Organizating Committee, the Freedom Democratic Party of Mississippi, ACCESS, and JOIN, for the period January 1, 1964, to date;

(6) All books, records, correspondence, documents, and other papers which relate to or are concerned with membership in or employment by the National Conference for New Politics and Vietnam Summer, of Alan McSurely and/or Margaret McSurely for the period January 1, 1964, to date;

(7) All books, records, correspondence, documents, and other papers which relate to or are concerned with Alan McSurely's employment by Appalachian Volunteers;

(8) All books, records, correspondence, documents, and other papers which relate to or are concerned with the employment of Alan McSurely and/or Margaret McSurely by the United Planning Organization (UPO) in Washington, D. C., for the period January 1, 1964, to date.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN MCSURELY and MARGARET MCSURELY, Plaintiffs, v. JOHN L. MCCLELLAN, individually, JEROME ADLERMAN, DONALD F. O'DONNELL, and JOHN BRICK, each individually and as agent of the United States Senate Subcommittee on Investigations of the Senate Committee on Government Operations, and THOMAS RATLIFF, individually and as sometime Commonwealth Attorney for Pike County, Kentucky, Defendants.	FILED Sep. 7, 1971 James F. Davey, Clerk Civil Action 516-69

AMENDED AND SUPPLEMENTAL COMPLAINT

Plaintiffs for their amended and supplemental complaint allege as follows:

I. PARTIES

1. Plaintiffs, Alan McSurely and Margaret McSurely, husband and wife, are citizens of the United States and presently reside in the City and State of New York.

2. Defendant John L. McClellan is a citizen of the United States and the State of Arkansas, and Chairman of the Permanent Subcommittee on Investigations of the United States Senate Committee on Government Operations, hereinafter referred to as the "Subcommittee".

3. Defendants Jerome S. Alderman, Donald F. O'Donnell, and John Brick, upon information and belief, are citizens of the United States and the District of Columbia, and are respectively the General Counsel, Chief Counsel, and Investigator of the Subcommittee.

4. Defendant Thomas Ratliff is a citizen of the United States and the Commonwealth of Kentucky.

5. The defendants Adlerman, O'Donnell, and Brick are sued individually and as agents of the United States Senate Subcommittee on Investigations of the Senate Committee on Government Operations, which said positions they occupied at all times hereinafter mentioned.

6. The defendant Ratliff is sued individually and in his official capacity as sometime Commonwealth Attorney for Pike County, which said position he occupied at all times hereinafter mentioned.

II. JURISDICTION

7. The jurisdiction of the Court arises under 28 U.S.C., Secs. 1331, 1332, 1343(3) and (4); 42 U.S.C., Secs. 1981, 1983, and 1985; and under the Constitution of the United States and in particular under the First, Fourth, Fifth, and Fourteenth Amendments thereto.

8. The matter in controversy exceeds the sum of $10,000.

III. CAUSE OF ACTION

9. The Counties in Eastern Kentucky where the plaintiffs lived and worked in 1967 and 1968 have an estimated 35 billion tons of coal under their rocky, mountainous surface, of which only two billion have been mined in the past 75 years. Ten of the 20 poorest Counties in the nation are located in this area. Pike County, the largest coal-producing County in the area, is among them. Pikeville, the County seat, is the headquarters of the National Independent Coal Operators Association, Inc. (NICOA), which was organized by defendant Ratliff to represent the interests of all the non-union coal mine owners in Eastern Kentucky. Defendant Ratliff has major coal mining interests of his own in Pike County.

10. In April of 1967, plaintiffs Alan and Margaret McSurely settled in Pikeville and became employed by the Southern Conference Educational Fund, a non-profit organization whose purpose is to help to secure to black and white Americans in the Southern part of the United States rights guaranteed to them under the Constitution and to end all forms of racial segregation and economic injustice.

The plaintiffs immediately began to assist the poor and working citizens of Pike County, both black and white, to organize themselves politically in order to improve their social, political, and economic conditions. Plaintiffs were involved in opposition to coal mine operators in general and the non-union NICOA in particular. They also did research on and wrote about certain Pike County officials. Plaintiffs called for an "overthrow of the local Court House Gang", and for the election of a slate of people's candidates who would tax at a high rate the coal leaving the County, with the resulting money to be used to build good homes, hospitals, schools, and roads with local labor.

11. On the afternoon of August 11, 1967, defendant Ratliff, acting under color of his office as Commonwealth Attorney for Pike County, met with Robert Holcomb, president of NICOA and the Pike County Chamber of Commerce, the Sheriff of Pike County, several members of the Pike County Chamber of Commerce and the Fiscal Court thereof, and others. At this meeting, defendant Ratliff suggested that raids be made on the homes of the plaintiffs and one Joseph Mulloy (then an organizer for the Appalachian Volunteers, a private non-profit corporation dedicated to furnishing assistance to the poor people in Eastern Kentucky, West Virginia, and Virginia). Defendant Ratliff also suggested that the plaintiff Alan McSurely and Joseph Mulloy be arrested and that their books, documents and other records be seized. Later the same afternoon, closed hearings were held in the Pike County Court House, as a result of which arrest and search warrants were issued with respect to plaintiff Alan McSurely and to Joseph Mulloy, based upon KRS 432.040, an anti-sedition statute. The indictment framed against plaintiff Alan McSurely and Mulloy was on its face invalid in the light of the decision of the Supreme Court of Appeals of the Commonwealth of Kentucky in *Braden* v. *Commonwealth*, 291 S.W. 2d 843, which applied the principles of federal preemption to prosecutions for sedition.

12. Late in the evening of August 11, 1967, defendant Ratliff led a raiding part of about 14 men, some of whom were deputy sheriffs, into the home of the plaintiffs in Pikeville. When defendant Ratliff discovered that plaintiff Margaret McSurely had once worked for the Student Non-

Violent Coordinating Committee, he ordered a member of the raiding party to prepare an arrest warrant for her. After over two hours of rifling through personal belongings of the plaintiffs, around 11 P.M. defendant Ratliff had them transported to the County jail and seized a pickup truckload of their papers and belongings. The same scene was repeated about 1 A.M. at the home of Mulloy. The raids are best described by Circuit Judge Bert Combs in the opinion which invalidated KRS 432.040:

> On the night of August 11, 1967, under authority of warrants charging seditious activity against the United States and the Commonwealth of Kentucky in violation of KRS 432.040, officials of Pike County and their deputies arrested the McSurelys and Mulloy. The officials also seized and impounded 564 loose books, pamphlets and other private and published documents found in the McSurelys' home. They also impounded a suitcase of clothes and several personal items which were caught up in the whirlwind of the search. 282 F. Supp. 848, 850.

13. The said raids were conducted pursuant to a search warrant unconstitutional on its face and issued on a wholly inadequate affidavit. The said raids were conducted in a grossly unconstitutional fashion and far beyond the scope of the warrant, and included seizure of practically every piece of writing or scrap of paper in the home of the plaintiffs. The apparent purpose and effect of the raids and subsequent prosecutions was later characterized by Circuit Judge Combs as being designed—

> . . . at least in part, in order to stop plaintiff's organizing activities in Pike County. That effect has been successful. Not only has there been the "chilling effect" on freedom of speech referred to in *Dombrowski*, there has been, in fact, a freezing effect. 282 F. Supp. 848, 852-3.

14. The actions of the defendant Ratliff aforesaid constituted a willful deprivation of the rights, privileges and immunities granted to the plaintiffs under the laws and Constitution of the United States and were designed to and had the effect of preventing the plaintiffs from effectively functioning in Pike County.

15. On or about August 11, 1967, or immediately thereafter, defendant Ratliff announced publicly that the seized material would be made available to Congressional committees.

16. On August 16, a plenary federal action was instituted by the plaintiffs herein, seeking an injunction restraining the enforcement of the overly-broad and unconstitutional anti-sedition statute and seeking the return of the seized documents and records.

17. A three-judge federal District Court was duly convened to hear and determine the complaint, and on September 14 it issued a permanent injunction under the authority of *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), restraining the enforcement of the commonwealth statute and the pending criminal proceedings thereunder. It did not, however, give immediate relief as to the documents which had been seized under the statute. It ordered instead that the documents and other seized material be kept in the custody of the defendant Ratliff "to be held by him in safe keeping" pending a possible appeal by the defendant Ratliff, *et al.* No appeal was filed from the foregoing ruling of the United States District Court.

18. At or about the time of the initial unconstitutional and illegal raids, the defendants McClellan, Adlerman, O'Donnell, Brick, and others to the plaintiffs now unknown, willfully and with intent to deprive plaintiffs of their rights, privileges and immunities granted to them as citizens of the United States by the laws and Constitution of the United States, including particularly the First, Fourth, and Fifth Amendments thereto, acting both individually and jointly and/or in conspiracy with each other, undertook a plan of action to:

a) Continue the course of action undertaken by defendant Ratliff in conjunction with NICOA and others to harass, intimidate and stigmatize the plaintiffs in order to prevent plaintiffs from continuing their political, poverty and civil rights activity in Eastern Kentucky, in violation of plaintiffs' rights under the First, Fifth and Fourteenth Amendments to the United States Constitution.

b) Obtain the private books and records of the plaintiffs, including membership lists of the Southern Conference Educational Fund and other organizations with which plaintiffs were associated, and the personal correspondence of the plaintiffs with their intimate friends for the private purposes of defendant McClellan in order to harass and intimidate plaintiffs and individuals with whom plaintiffs may have been associated, and likewise to serve the objectives of the defendants McClellan, Adlerman, O'Donnell, and Brick to harass plaintiffs and organizations with which they may have been associated, in avoidance of decisions of the United States Supreme Court prohibiting enforced production of membership lists of organizations seeking enforcement of minority rights and guarantees of the Equal Protection of the United States Constitution, thereby violating the rights of the plaintiffs and others under the First, Fifth, and Fourteenth Amendments to the United States Constitution;

c) Use the instrumentality of the Subcommittee investigation to discredit those persons and organizations as are working for the benefit of the impoverished citizens of the United States by branding the activities of said persons and organizations subversive and seditious, in violation of the rights of the plaintiffs in particular and such persons generally under the First, Fifth, and Fourteenth Amendments to the United States Constitution.

The actions of the defendants aforesaid included acting in concert and conspiracy with defendant Ratliff, who was acting under color of his office as Commonwealth Attorney for Pike County.

19. Pursuant to the foregoing and notwithstanding the order of the United States District Court aforesaid, upon instructions of defendant McClellan and under the supervision of defendants Adlerman and O'Donnell, but without the knowledge or approval of the Senate Subcommittee or of the full Senate Committee, defendant Brick met with defendant Ratliff and received his approval, agreement and assistance to inspect, without knowledge of the plaintiffs, the papers which had been unconstitutionally seized from them. Thereupon, defendant Brick did in fact and without the knowledge of the plaintiffs, inspect the private and personal correspondence and papers of the plaintiffs, obtained photographs and copies of 242 items, and took them back to Washington, D.C., where he exhibited them to persons

whose names are unknown to the plaintiffs, to the damage and embarrassment of the plaintiffs.

20. Further, and at the personal direction of defendant McClellan and under the supervision of defendants Adlerman and O'Donnell, defendant Brick prepared subpoenas duces tecum, in fact composed exclusively on the basis of the wrongful inspection and unlawful appropriation of the documents referred to above. Defendant McClellan signed said subpoenas, which were directed both to the plaintiffs and the defendant Ratliff, with full knowledge of the manner in which they were composed. The preparation and proposed use of the said subpoenas, as hereinafter set forth, was deliberately arranged between defendant Brick and defendant Ratliff in the hope that since it was the defendant Ratliff who had physical custody of the papers, he would respond to the subpoena without the possibility of interference by the plaintiffs. Moreover, it was planned that they could conceal the fact that defendant Brick had already inspected all the documents aforesaid and had taken copies of many of them. The defendants McClellan, Adlerman and O'Connell were fully advised of the foregoing and the defendant Brick acted with their knowledge and under their direction.

21. On October 15, before the expiration of the time for appeal from the order of September 14, 1967, in accordance with the aforesaid plan, defendant Ratliff, holding the documents aforesaid by order of the District Court, did in fact receive a subpoena duces tecum from the Subcommittee to produce certain documents, materials and information broadly relating to the plaintiffs and to the membership and activities of more than 13 civil rights and related organizations. This alleged information was claimed to be in the illegally-seized materials of which the defendant Ratliff had temporary custody. Identical subpoenas were also served upon the United States Marshal and the plaintiffs.

22. The surreptitious examination of documents illegally seized, the preparation and issuance of the subpoenas based upon such examination, and the use of any of the documents, objects or articles described therein violated the constitutional rights of the plaintiffs, in particular the rights guaranteed by the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution, in that among

other things said documents, objects or articles were the fruit of an illegal search and seizure perpetrated for the purpose of harassing persons associated with the plaintiffs and of securing membership lists and other documents in defiance of the United States Constitution and for the purpose of causing the plaintiffs and the working people in the Counties of Eastern Kentucky to halt their attempts to work for the political and civil rights of poor and working citizens.

23. On October 18, 1967, plaintiffs filed motions in their pending action against the defendant Ratliff seeking the issuance of a temporary restraining order enjoining the release of the books, papers, documents and other materials sought under the aforesaid subpoena, and also a motion for an order directing the immediate return of said materials to the plaintiffs. It was in the course of the said litigation that the plaintiffs McSurely were able to establish the surreptitious examination of the documents and the taking of copies by the defendant Brick.

24. This litigation terminated on July 29, 1968, with a decision by the Court of Appeals for the Sixth Circuit directing the return of the seized documents. *McSurely* v. *Ratliff*, 398 F.2d 817, 818.

25. Frustrated in the initial attempt to subpoena the unconstitutionally-seized documents, the defendants McClellan, Brick, Adlerman, and O'Donnell, pursuant to the original plan, arranged for the issuance of new subpoenas duces tecum directed at the plaintiffs, to be served upon them immediately upon the return of the documents, and further arranged to time the return of the illegally-seized documents to coincide with the service of new subpoenas. These new subpoenas were but another attempt to further the aims of the aforesaid plan of the defendants McClellan, Adlerman, O'Donnell, and Brick among themselves and with the defendant Ratliff.

26. Three and a half months after the decision of the Court of Appeals for the Sixth Circuit, on November 8, 1968, in the United States Marshal's office at the Federal Building in Pikeville, at approximately 3:30 P.M., the illegally-seized materials taken from the plaintiffs and from Mulloy were returned to them by agents of the defendant Ratliff and by the defendant Brick. In the process of said

return, the defendant Brick deliberately and consciously made snide and demeaning remarks to plaintiff Alan McSurely in the presence of his wife with respect to her intimate and personal correspondence, of which defendant Brick had improperly received copies over a year before and had shown them to one or more members of the Subcommittee and its staff. Prior to this occasion, plaintiff Alan McSurely had not even been aware that personal correspondence of his wife with respect to a period prior to their marriage had been seized. The date of the return of the documents had been delayed and finally arranged for November 8 jointly by the defendants Ratliff and Brick so that the defendant Brick, acting under orders of the defendants McClellan, Adlerman and O'Donnell, could cause to be served the new subpoenas on the McSurelys as they received the documents pursuant to the court order.

27. The information sought in the new subpoenas, with minor exceptions, was identical to the information sought in the original Subcommittee subpoenas that were composed on the information surreptitiously and unlawfully obtained by Brick and other agents of the Subcommittee through their inspection of the documents pursuant to the arrangements made with the defendant Ratliff, acting under color of the law of the Commonwealth of Kentucky. The new subpoenas called for the production of documents, materials and information broadly relating to the membership and activities of the plaintiffs. In addition, the subpoenas sought information pertaining to the membership and activities of civil rights and related organizations, all of which utilized First Amendment freedoms to attain their objectives, including among others:

a) United Planning Organization, an umbrella anti-poverty agency for Washington, D.C. that served as the primary funding agency for all community action projects in the District of Columbia;

b) Appalachian Volunteers, a project of the Office of Economic Opportunity located in the States of Virginia, West Virginia and Kentucky, and staffed by VISTA volunteers working among the poor in the Appalachian Mountains;

c) Vietnam Summer, an unincorporated association maintaining an office for business purposes in the Commonwealth of Massachusetts. Its purpose was to organize the millions of Americans troubled by the war in Vietnam. At the end of the 1967 summer, Vietnam Summer ceased to function.

d) National Conference for New Politics, an unincorporated association maintaining an office for business in the City and State of New York. Its primary function was to further the growth of a new politics for people who wish to control the decisions which affect their lives. The NCNP ceased to function in the fall of 1967.

28. Plaintiffs assert, and have at all times asserted, that the subpoenas duces tecum were invalid for a number of reasons including but not limited to the following:

a) The subpoenas were based upon knowledge wrongfully gained from an inspection of documents illegally and unlawfully seized by officials of the Commonwealth of Kentucky and thereby violate the plaintiffs' rights under the Fourth, Fifth and Fourteenth Amendments; and

b) The conduct of the Chairman of the Subcommittee and the defendants constituting members of his staff, from the inception of its so-called investigation, demonstrated that they were not conducting a *bona fide* investigation, in that—

i) They were using the instrumentality of an investigation to harass those persons with views differing from those of the Chairman of the Subcommittee. Thus, in the instant case, the defendants in effect lent the investigative facilities of the United States Senate to continue a repressive prosecution by defendant Ratliff by unlawfully inspecting documents illegally seized by Ratliff in order to serve subpoenas which were flagrantly unconstitutional and overbroad.

ii) The defendant McClellan, in fact, used the instrumentality of the investigation to carry out a personal vendetta between himself and a certain personage of prominence named in some of the private correspondence of the plaintiff Margaret McSurely. This flagrant misuse of the powers of his position placed the actions of the defendant McClellan far outside the scope of his office and the protection of his position.

29. On March 4 and 7, 1969, plaintiffs McSurely appeared before the Subcommittee but declined to recognize the

validity of the aforesaid subpoenas and refused to produce the documents listed therein.

30. Thereupon, defendant McClellan, assisted by defendants Adlerman, Brick, and O'Donnell, managed to obtain the support of the Subcommittee, the Committee, and the full United States Senate for prosecutions against the plaintiffs for contempt, by deliberately and consciously withholding facts relating to the issuance of the aforesaid subpoenas, particularly that the said subpoenas were composed on the basis of the surreptitious examination of illegally-seized documents. In doing so, the defendant McClellan sought to conceal the illegal activities which he and the defendants Adlerman, Brick and O'Donnell had engaged in together with the defendant Ratliff.

31. Plaintiffs allege, upon information and belief, that had the members of the United States Senate known of the facts in this matter and the basis for the issuance and framing of the subpoenas, those members would not have approved the contempt citations.

32. In due course the plaintiffs were indicted, tried and convicted for contempt of the Subcommittee, said conviction now pending on appeal. The facts and matters forming the basis of the within complaint were not submitted for determination by the jury in that case and the Court ruled them irrelevant to the narrow issues presented in the contempt proceeding. Accordingly, the issues in this proceeding are unaffected by the contempt prosecution.

33. The aforesaid acts, including the unlawful seizure, inspection, appropriation and publication of plaintiffs' private papers and documents, the deliberate timing of the return of the papers pursuant to court order so that new unlawful subpoenas could be served, the issuance of subpoenas based upon illegally-obtained information, and the deliberate withholding of all the foregoing from members of the United States Senate, all pursuant to the original plan of the defendants McClellan, Adlerman, Brick and O'Donnell, resulted in the continued harassment and embarrassment of the plaintiffs. The publicity surrounding the acts of the said defendants had the effect of stigmatizing the plaintiffs, resulting in a series of threats and incidents of harassment, culminating in the dynamiting of plaintiffs' home on December 13, 1968, as a result of which plaintiffs were

compelled to leave the area of Pike County, thereby effecting one of the primary aims of the original plan—to prevent plaintiffs from continuing their work to advance the political rights and personal well-being of the poor and working citizens of Eastern Kentucky.

34. The aforesaid acts effected pursuant to the plan aforesaid caused the plaintiffs intense mental and emotional pain and suffering, embarrassment, humiliation, and loss of employment, as did the attendant and resultant publicity caused thereby.

35. Plaintiffs seek damages herein for the unlawful seizure, inspection and appropriation of their personal and business papers and documents and other objects and articles, for the issuance of subpoenas based on illegally-obtained information and invalid on their face, for the humiliation and embarrassment, mental and emotional pain, loss of employment, disruption of personal privacy and safety caused thereby, all in violation and derogation of their rights under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution and the laws of the United States.

WHEREFORE, plaintiffs respectfully pray that this Court:

1. Award compensatory damages against each defendant in the sum of $50,000 to plaintiff Alan McSurely and a like amount from each defendant to plaintiff Margaret McSurely.

2. Award punitive damages against each defendant in the sum of $50,000 to plaintiff Alan McSurely and a like amount from each defendant to plaintiff Margaret McSurely.

3. Issue such other and further relief as this Court may deem appropriate or necessary.

Attorneys for Plaintiffs

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PHILIP J. HIRSCHKOP
503 D Street N.W.
Washington, D.C. 20001

By: PHILIP J. HIRSCHKOP

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN MCSURELY, *et al.*, PLAINTIFFS, v. JOHN L. MCCLELLAN, *et al.*, DEFENDANTS.	Civil Action No. 516-69

ANSWER

Defendants, John L. McClellan, Edmund S. Muskie, Karl E. Mundt, and Jerome S. Adlerman, by their undersigned attorneys, in answer to the complaint herein, admit, deny, and allege as follows:

1 through 6 inclusive. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations contained in paragraphs 1 through 6 inclusive of the complaint.

7, 8 and 9. Defendants admit the allegations contained in paragraphs 7, 8 and 9 of the complaint.

10 and 11. Defendants deny the allegations contained in paragraphs 10 and 11 of the complaint.

12 through 15 inclusive. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations contained in paragraphs 12 through 15 inclusive of the complaint.

16 through 29 inclusive. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations contained in paragraphs 16 through 29 of the complaint, except that defendants admit that on August 16, 1967, an action was filed in the United States District Court for the Eastern District of Kentucky by Alan McSurely, and others, against Thomas B. Ratliff, and others, to which was assigned Civil No. 1146, and that proceedings were thereafter conducted in the District Court for the Eastern District of Kentucky, the United States Court of Appeals for the Sixth Circuit, and the United States Supreme Court, and that various opinions and orders entered in said proceedings are published as *McSurely* v. *Ratliff*,

282 F. Supp. 848 (E.D. Ky., 1967); *McSurely* v. *Ratliff*, 398 F.2d 817 (C.A. 6, 1968); *McSurely* v. *Ratliff*, 389 U.S. 949 (1967); 390 U.S. 412 (1968); 390 U.S. 914 (1968), and refer the Court to the record of such action for a true and complete statement of the orders and proceedings therein.

30. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations in paragraph 30 of the complaint, except that defendants admit that the subpoenas referred to were issued and duly served.

31. Defendants deny the allegations contained in paragraph 31 of the complaint and defendants respectfully refer the Court to the subpoenas, dated November 4, 1968, for the terms thereof.

32 and 33. Defendants admit the allegations contained in paragraphs 32 and 33 of the complaint.

34 through 39 inclusive. Defendants deny the allegations contained in paragraphs 34 through 39 inclusive of the complaint.

Defendants deny each and every allegation of the complaint not herein admitted, qualified, or denied.

First Defense

The Court lacks jurisdiction over the subject matter of this action.

Second Defense

The complaint fails to allege a justiciable case or controversy.

Third Defense

The complaint fails to state a claim upon which relief can be granted.

Fourth Defense

Any and all actions taken by the defendants John L. McClellan, Edmund S. Muskie, and Karl E. Mundt were done by them as United States Senators in the course of legislative activity and for this reason are absolutely privileged, and defendants John L. McClellan, Edmund S. Muskie, and Karl E. Mundt are, as United States Senators, immune from liability.

Fifth Defense

Any and all actions taken by the defendant Jerome S. Adlerman in the premises were done by him as an official of the federal government in the course of his duties and within the scope of his official duties and for this reason are absolutely privileged.

WHEREFORE, having fully answered, the defendants pray:

1. That the relief requested by plaintiffs be denied and the action herein be dismissed; and

2. That defendants be given all such other and further relief as the Court may deem just and proper.

Respectfully submitted,

William D. Ruckelshaus
Assistant Attorney General

Thomas A. Flannery
United States Attorney

Harland F. Leathers

Irwin Goldbloom
Attorneys, Department of Justice
Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN MCSURELY, *et al.*, PLAINTIFFS, v. JOHN L. MCCLELLAN, *et al.*, DEFENDANTS.	Civil Action No. 516-69

ANSWER

Defendant, Donald F. O'Donnell, by his undersigned attorneys, in answer to the complaint herein, admits, denies, and alleges as follows:

1 through 6 inclusive. For lack of knowledge or information sufficient to form a belief, defendant denies the allegations contained in paragraphs 1 through 6 inclusive of the complaint.

7, 8 and 9. Defendant admits the allegations contained in paragraphs 7, 8 and 9 of the complaint.

10 and 11. Defendant denies the allegations contained in paragraphs 10 and 11 of the complaint.

12 through 15 inclusive. For lack of knowledge or information sufficient to form a belief, defendant denies the allegations contained in paragraphs 12 through 15 inclusive of the complaint.

16 through 29 inclusive. For lack of knowledge or information sufficient to form a belief, defendant denies the allegations contained in paragraphs 16 through 29 of the complaint, except that defendant admits that on August 16, 1967, an action was filed in the United States District Court for the Eastern District of Kentucky by Alan McSurely, and others, against Thomas B. Ratliff, and others, to which was assigned Civil No. 1146, and that proceedings were thereafter conducted in the District Court for the Eastern District of Kentucky, the United States Court of Appeals for the Sixth Circuit, and the United States Supreme Court, and that various opinions and orders entered in said pro-

ceedings are published as *McSurely* v. *Ratliff*, 282 F. Supp. 848 (E.D. Ky., 1967); *McSurely* v. *Ratliff*, 398 F.2d 817 (C.A. 6, 1968); *McSurely* v. *Ratliff*, 389 U.S. 949 (1967); 390 U.S. 412 (1968); 390 U.S. 914 (1968), and refers the Court to the record of such action for a true and complete statement of the orders and proceedings therein.

30. For lack of knowledge or information sufficient to form a belief, defendant denies the allegations in paragraph 30 of the complaint, except that defendant admits that the subpoenas referred to were issued and duly served.

31. Defendant denies the allegations contained in paragraph 31 of the complaint and defendant respectfully refers the Court to the subpoenas, dated November 4, 1968, for the terms thereof.

32 and 33. Defendant admits the allegations contained in paragraphs 32 and 33 of the complaint.

34 through 39 inclusive. Defendant denies the allegations contained in paragraphs 34 through 39 inclusive of the complaint.

Defendant denies each and every allegation of the complaint not herein admitted, qualified, or denied.

FIRST DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

SECOND DEFENSE

The complaint fails to allege a justiciable case or controversy.

THIRD DEFENSE

The complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

Any and all actions taken by the defendant Donald F. O'Donnell in the premises were done by him as an official of the federal government in the course of his duties and within the scope of his official duties and for this reason are absolutely privileged.

WHEREFORE, having fully answered, the defendant prays:

1. That the relief requested by plaintiffs be denied and the action herein be dismissed; and

2. That defendant be given all such other and further relief as the Court may deem just and proper.

Respectfully submitted,

WILLIAM D. RUCKELSHAUS
Assistant Attorney General

THOMAS A. FLANNERY
United States Attorney

HARLAND F. LEATHERS

IRWIN GOLDBLOOM

Attorneys, Department of Justice
Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN MCSURELY, *et al.*,
PLAINTIFFS,

v.

JOHN L. MCCLELLAN,
Chairman, et al.,
DEFENDANTS.

Civil Action
No. 516-69

MOTION TO DISMISS OR IN THE ALTERNATIVE
FOR SUMMARY JUDGMENT

Senator John L. McClellan, Jerome Adlerman, Donald O'Donnell and John Brick, defendants in the above-captioned cause, hereby move the Court, pursuant to Rules 12(b) and 56(b), Federal Rules of Civil Procedure, for an order dismissing the amended complaint or in the alternative for summary judgment on the grounds that:

1. Defendants are immune from actions for damages where as here it is clear that their conduct was within the sphere of legislative activity.

2. The complaint fails to state a claim upon which relief can be granted against defendants who were a United States Senator or employees of the Senate of the United States at all times material to this cause.

3. Plaintiffs are barred by collateral estoppel from relitigating issues previously settled by the judgment of this Court in *United States* v. *Alan McSurely and Margaret McSurely,* Criminal Nos. 1376-69, 1377-69 (pending on appeal as Nos. 24,812, 24,813).

In support of these motions, the Court is respectfully referred to the affidavit of Senator John L. McClellan,

attached hereto, and to the Memorandum of Points and Authorities filed herewith.

Respectfully submitted,

.....
L. PATRICK GRAY, III
Assistant Attorney General

.....
THOMAS A. FLANNERY
United States Attorney

.....
IRWIN GOLDBLOOM
Attorney, Department of Justice

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN MCSURELY, *et al.*, PLAINTIFFS, v. JOHN L. MCCLELLAN, *Chairman, et al.*, DEFENDANTS.	Civil Action No. 516-69

AFFIDAVIT

JOHN L. MCCLELLAN, first having been duly sworn, deposes and says:

1. Affiant, from January 1943 to the present, has served as the duly elected United States Senator from the State of Arkansas.

2. At all times material hereto affiant has been the Chairman of the Permanent Subcommittee on Investigations of the United States Senate Committee on Government Operations. This committee is a duly established standing committee by the Senate of the United States. Defendants Adlerman, O'Donnell and Brick were, at times material to the allegations of the complainant, general counsel and chief counsel and investigator, respectively, of the Permanent Subcommittee on Investigations (hereinafter referred to as "Subcommittee") and as such were employees of the Senate of the United States. Defendants Adlerman and O'Donnell have since retired and are no longer employed by the Subcommittee.

3. The Senate Committee on Government Operations or any subcommittee thereof was authorized by Senate Resolution 150, 90th Congress, First Session, agreed to on August 11, 1967, Senate Resolution 216, 90th Congress, Second Session, agreed to on March 15, 1968, and Senate Resolution 26, 91st Congress, First Session, agreed to on February 17, 1969, to make investigations from August 12, 1967 to January 31, 1970, on the following matters:

> "To make a full and complete study and investigation of violent disturbances of the peace, vandalism, civil

and criminal disorder, insurrection, the commission of crimes in connection therewith, the immediate and longstanding causes, the extent and effects of such occurrences and crimes and measures necessary for their immediate and long range prevention for the preservation of law and order and to ensure domestic tranquility within the United States."

On or about August 12, 1967, the Chairman of the Senate Committee on Government Operations designated and appointed the Permanent Subcommittee on Investigation to conduct the investigations contemplated by the aforesaid resolution.

4. Pursuant to the authority granted by said resolution the Subcommittee on August 12, 1967, commenced to and has at times material hereto investigated riots and major civil disturbances in urban areas of the United States, to determine whether they were spontaneous or if they were instigated by agitators, militant organizations or lawless elements, and whether such instigation was organized on a national level or on a local level. In the course of such investigations the Subcommittee received from various sources information concerning a riot which had occurred in Nashville, Tennessee on April 8-9, 1967, tending to show the said riot was instigated by persons holding positions in national organizations active in rioting and civil disturbances in several major urban areas of the United States.

5. Pursuant to this information affiant and employees and agents of the Subcommittee, acting as such, sought information concerning records about such organizations which the McSurely's might have had in their custody.

6. Affiant, on or about November 4, 1968, as chairman of the Subcommittee authorized the issuance of a subpoena of the Senate of the United States to Alan and Margaret McSurely, returnable before the said Subcommittee on January 14, 1969, directing the production of certain books, papers and documents. On information and belief, affiant states that the subpoena was duly served on the McSurelys on or about November 8, 1968. The return date on the subpoenas was continued to March 4, 1969, on which date the McSurelys appeared before the Subcommittee and refused to produce any documents as specified in the subpoena.

7. On June 26, 1970, the McSurelys were convicted in the United States District Court for the District of Columbia for contempt of Congress for failing to comply with that subpoena.

8. On or about May 1, 1969, the United States Senate Committee on Government Operations published Report No. 91-137 which outlined the relationship of the Committee and their investigations with respect to Alan and Margaret McSurely. Copy of said report is attached hereto as Exhibit A.

9. In that Report, the Committee found that a Subcommittee staff member travelled to Pikeville, Kentucky, in October 1967, and confirmed that books, records and documents then in the possession of the District Attorney for Pike County, Kentucky, would be of value to the Subcommittee's investigation of the riots in Nashville and other matters relating to organizations then engaged in instigating or fermenting unrest and outbreaks of violence in urban areas. The Subcommittee staff were given some of the documents and other material, and after discussions of the nature of the material the Chairman authorized the preparation and service of subpoenas for the production of certain categories of documents from material held by the Pike County district attorney. These subpoenas were served on the district attorney and the U.S. Marshal for the Eastern District of Kentucky, on October 17, 1967, and on Alan and Margaret McSurely on October 18, 1967, in Pikeville, Kentucky.

10. The staff member of the Subcommittee who had custody of the documents given him by the Commonwealth attorney for the Pike County in October of 1967, and who had sole custody of them in the interim, travelled to Pikeville, Kentucky, on August 14, 1968, and returned the documents to a representative of the Commonwealth's office from whom he had originally received them. On November 3, 1968, Alan and Margaret McSurely were served with new subpoenas calling them to appear before the Subcommittee on January 14, 1969, and produce documents.

11. Affiant flatly denies any conspiracy, collaboration or any other participation of any sort in the allegedly illegal police raid allegedly planned and conducted by defendant Ratliff.

12. Affiant further states that he is informed that defendant John Brick testified, under oath and subject to cross examination, in *United States* v. *McSurely*, Crim. Nos. 1376-7, that John Brick did not play any part in the selection of the documents handed to him in October 1967 by Thadeus Scott, Commonwealth Detective; that Mr. Brick was informed that they were authorized to permit him to inspect the records. John Brick further testified that the documents obtained from the Pikeville Commonwealth Detective were not publicized, distributed, or seen by anybody outside the Committee, and not by anybody "inside of the Committee" either. Documents were maintained in Mr. Brick's personal file, under lock and key, and this was "by order of Senator McClellan." He further testified that the documents were returned to Thadeus Scott on October 14, 1968. Mr. Brick did not make a single copy of any of the documents and he retained none. He does not have any now, and the Subcommittee does not have any. (Tr. 729-730). Senator McClellan was shown only one document by John Brick, and Senator McClellan instructed him to lock that document up and put it in an envelope marked "To Be Opened Only By John Brick, J. S. Adlerman, General Counsel, or Senator McClellan." Mr. Brick did not believe he ever looked at that letter again after he put it in the sealed envelope. (Tr. 732-734).

13. All actions of affiant and defendants Adlerman, O'Donnell and Brick in relation to the McSurelys were done within the scope of the duties required as agents, employees or representatives of the Subcommittee, and all such actions were taken pursuant to a lawful congressional investigation within the legislative authority of the Senate of the United States as assigned to said Subcommittee.

/s/ John L. McClellan
JOHN L. MCCLELLAN

Subscribed and sworn to before
me this 26th day of Oct., 1971.

Wm. R. Lewis
Notary Public

My Commission expires: 12/14/73

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

ALAN MCSURELY, *et al.*, PLAINTIFFS, v. THOMAS B. RATLIFF, *et al.*, DEFENDANTS.	Civil Action No. 1146

AFFIDAVIT BY JOHN L. MCCLELLAN

John L. McClellan, having been duly sworn, states as follows:

1. I am a member of the United States Senate for the State of Arkansas and have been since 1942. Since 1955, I have been Chairman both of the Senate Committee on Government Operations and of the Permanent Subcommittee on Investigations of the Committee on Government Operations.

2. Attached hereto as Exhibit A is a copy of the statement which I made on Wednesday, November 1, 1967, in connection with the hearings presently being held by the Permanent Subcommittee on Investigations of the Committee on Government Operations sometimes referred to herein as the Subcommittee.

3. Attached hereto as Exhibit B is a copy of the report of the Assistant Chief Clerk of the Committee on Government Operations detailing the approval by the Committee on Government Operations of Senate Resolution 150, prior to the amendment and approval of that resolution by the Senate Committee on Rules and Administration and unanimous approval by the Senate.

4. Attached hereto as Exhibit C is a copy of a letter dated August 12, 1967, in which the duty of carrying out the directions of Senate Resolution 150, 90th Congress, 1st Session, was duly delegated to the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations.

5. Attached hereto as Exhibits D, E, F, and G are one copy each of the subpoenas issued on October 16, 1967, by the Senate Permanent Subcommittee on Investigations of

the Committee on Government Operations, to Alan McSurely, Margaret McSurely, Archie Craft and Thomas B. Ratliff.

6. The Permanent Subcommittee on Investigations has received sworn testimony during public hearings that the riots which occurred in Nashville, Tennessee, on April 8, 1967, and thereafter, were instigated, precipitated or encouraged by individuals identified as members, employees, or affiliates of the Student Non-Violent Coordinating Committee, the Southern Conference Educational Fund, the Southern Students Organizing Committee and the Communist Party or other Marxist-Leninist organizations. The Subcommittee has also received sworn testimony that Alan McSurely and Margaret McSurely, the plaintiffs in this proceeding, attended a meeting or meetings from April 5 through 8, 1967, in Nashville, Tennessee, with Stokely Carmichael and/or members, employees, or affiliates of the Student Non-Violent Coordinating Committee, the Southern Conference Educational Fund, and the Southern Students Organizing Committee.

7. The investigatory staff of the Subcommittee has received information from various sources including the Commonwealth Attorney for Pike County, Kentucky, Thomas L. Ratliff, which information has not yet been the subject of sworn testimony before the Subcommittee, indicating that individuals identified as members, employees, or affiliates of the following organizations have been involved to some extent in causing the riots and other disturbances set forth in Senate Resolution 150: the Students for a Democratic Society, the National Conference for New Politics, Vietnam Summer, the Freedom Democratic Party of Mississippi, ACCESS, JOIN, Appalachian Volunteers, and the United Planning Organization.

8. From the foregoing, it is clear that the materials sought by the Subcommittee mentioned above (Exhibits D, E, F, and G) are highly pertinent to the investigation authorized by Senate Resolution 150.

JOHN L. MCCLELLAN
/s/ John L. McClellan

Subscribed and sworn to before
me at Washington, D.C., this
2nd day of November, 1967.

David G. Stevinson
Notary Public
In and for the District of Columbia

My Commission Expires May 13, 1963

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN MCSURELY, *et al.*, PLAINTIFFS, v. JOHN L. MCCLELLAN, *Chairman, et al.*, DEFENDANTS.	Civil Action No. 516-69 ANSWERING AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ALAN MCSURELY and MARGARET MCSURELY, plaintiffs herein, being duly sworn according to law, upon their oaths depose and say:

1. We make this affidavit in respect to the motion for summary judgment made by the defendants, and in specific response to the affidavit of Senator McClellan verified October 26, 1971.

2. We admit the statements in paragraphs 1 and 2 of defendant McClellan's affidavit, but deny the statements in paragraph 3 thereof. It is not a fact that Senate Resolution 150 authorized *any* Subcommittee of the Senate Committee on Government Operations to make certain investigations; it was only a duly authorized Subcommittee thereof. Moreover, the actions of the chairman of the Senate Committee on August 12, 1967, purporting to designate the Subcommittee to conduct certain investigations, were beyond his power. In any event, his actions in 1967 applied only to Senate Resolution 150, and not to Senate Resolution 216, which was operative during 1968.

3. We dispute the allegations of paragraph 4 of defendant McClellan's affidavit and state that in fact the Subcommittee was not making an investigation of riots and civil disturbances in urban areas, as stated in the said paragraph, and we specifically dispute the allegation that the Subcommittee had received information concerning a riot which had occurred in Nashville, Tennessee, on April 8-9, 1967, tending to show that said riot was instigated by particular indi-

viduals holding positions in national organizations allegedly active in rioting in several major areas in the United States.

4. We specifically dispute the claim of paragraph 5 of defendant McClellan's affidavit that, pursuant to any information referred to in paragraph 4 he or any agents of the Subcommittee sought information concerning organizations, records of which we might have had in our custody. We state that to the contrary the basis upon which our records were pursued was a plan and conspiracy entered into with the defendant Ratliff for the purpose of harassing us and driving us out of Pikeville, Kentucky, and further for the purpose of pursuing a private vendetta between the defendant McClellan and a person who had corresponded with Margaret McSurely.

5. With respect to the allegations of paragraph 6, we acknowledge that defendant McClellan authorized the issuance of a subpoena on November 4, 1968 but we allege that he had no authority to do so and that said subpoena was entirely unconstitutional and the acts of said defendant McClellan in doing the same were wholly beyond the scope of his power.

6. With respect to the allegations of paragraphs 8 and 9, we admit that the Subcommittee issued a report, No. 91-137, but we contend that said report was the work of defendants McClellan, Adlerman, O'Donnell and Brick, and that the statements therein were wholly self-serving and the true facts with respect to the conduct of the defendants were never revealed to the members of the Committee. Accordingly, the report of the Committee cannot be taken as having any bearing upon either the lawfulness or authorization of the actions of the staff or chairman of the Committee. In any event no report of the Committee could give authority to any members of the staff of the Senate to receive and bring to Washington wholly personal correspondence having no possible bearing on any work of the Committee, nor could any report of the Committee authorize the taking or inspection of documents which had been unlawfully seized.

7. With respect to paragraph 11, in which defendant McClellan flatly denies any conspiracy, collaboration or other participation of any sort in the illegal police raid planned and conducted by defendant Ratliff, we state that on information and belief the defendant McClellan, together

with defendants Adlerman, O'Donnell and Brick, joined in the conspiracy of the defendant Ratliff to force us out of Pikeville, and may have participated in the planning of the original raid, a subject to be determined by discovery; but whether said defendants actively participated in the planning of that raid, they nevertheless participated in the ensuing portions of the conspiracy to force us out of Pikeville.

8. We do not find it necessary to respond to paragraph 12, consisting of a selective review of some of the testimony of Mr. Brick, excepting to state that we do not accept as true the statements of Mr. Brick but expressly dispute the same and intend by further discovery in the course of this litigation and by taking the depositions of defendant Brick and others to get the true facts of this matter. We state that on information and belief the defendant Brick did in fact make copies of some of the private correspondence of Margaret McSurely and showed and distributed the same to staff members of the Committee and perhaps others.

9. With respect to the allegations of paragraph 13 of the affidavit of defendant McClellan, we expressly deny and dispute the contention that the actions of the defendants were within the scope of their duties or that such actions were taken pursuant to a lawful Congressional investigation.

/s/ Alan McSurely
ALAN MCSURELY

/s/ Margaret McSurely
MARGARET MCSURELY

Sworn to and subscribed before me,
a Notary Public of the State of
New York, this 2nd day of November,
1971.

Robert Pincus
Notary Public, State of New York
No. 03-8376215
Qualified in Bronx County
Certificate filed in New York County.

Commission Expires March 30, 1972.

AFFIDAVIT

DISTRICT OF COLUMBIA:

ALAN MCSURELY and MARGARET MCSURELY, of full age, being duly sworn according to law, upon their oath depose and say:

1. The following affidavit is submitted to supplement the record herein.

2. Under date of November 18, 1974, there was reported in *The New York Times* a disclosure of certain documents of the Internal Revenue Service, made as a result of a freedom of information suit filed on July 22, 1974 in the United States District Court for the District of Columbia by Robert Brandon and the Tax Reform Research Group.[1] The material was not made available until November 8, 1974 and not published in the *Times* until November 18, 1974.

3. Following that disclosure, we consulted with plaintiffs in that case, who permitted us to inspect material turned over to them by the Internal Revenue Service. That inspection revealed that there had been one or more meetings between the Activist Organizations Committee of the Internal Revenue Service and the staff of Senator John L. McClellan's Permanent Investigations Subcommittee, which meetings specifically worked out access by the Internal Revenue Service to the McClellan Committee's files.

4. We do not believe it was a coincidence that this apparently was generated on March 5, 1969—one day after we appeared before the McClellan Committee under Subpoena —by a letter of Senator McClellan to the Commissioner of the Internal Revenue Service, dated March 5, 1969.

5. While the material turned over to the Tax Reform Research Group did not include a copy of Senator McClellan's letter of March 5, 1969, it did include a copy of a letter from the Commissioner of the Internal Revenue Service which referred to the Senator's letter of that date. A copy of the Commissioner's letter, dated August 1, 1969 is annexed hereto as *Exhibit A*.

6. Senator McClellan responded to the Commissioner's letter under date of August 8, 1969, stating:

[1] Civil Action No. 74-1083; Robert M. Brandon v. Internal Revenue Service and Donald C. Alexander.

"I am pleased to advise you that I have directed the Subcommittee staff to comply with your request and make available any information we have which may be helpful to your investigation."

A copy of the letter is annexed hereto as *Exhibit B*.

7. The Commissioner's letter of August 1, 1969, followed a joint meeting between the staffs of the Internal Revenue Service and the McClellan Committee, summarized in a memorandum to the file dated July 29, 1969, a copy of which is annexed hereto as *Exhibit C*. This meeting laid the basis for the arrangement whereby Internal Revenue Service staff would be permitted to review the McClellan Committee files.

8. It is obviously of relevance to the case pending before this Court for us to ascertain whether material unlawfully seized from us, including Margaret McSurely's intimate and personal letters and names and addresses of members of numerous organizations, was turned over to the Internal Revenue Service by Defendants in this case.

9. We fully intend to pursue this matter on discovery in preparation for trial.

/s/ Alan McSurely
ALAN MCSURELY

/s/ Margaret McSurely
MARGARET MCSURELY

Sworn to and subscribed before me
this 25th day of November, 1974.

Francis L. Simmons
Notary Public

My Commission expires 6/14/76.

Aug. 1, 1969

Honorable John L. McClellan
Chairman, Senate Permanent Subcommittee on Investigations
Committee on Government Operations
Washington, D.C. 20520

Dear Mr. Chairman:

As you may know, on July 29, 1969, our Compliance people met with Mr. Philip R. Manuel, Mr. Fred R. Miller, and Mr. John R. Drass, staff members of your Committee, to discuss certain Internal Revenue Service plans concerning the type of organizations referred to in your letter of March 5, 1969.

We believe it would be helpful in our investigations if Mr. Paul H. Wright, Mr. Charles (illegible) , Mr. William F. Gibney, Mr. James J. McCarty and Mr. Edward D. Hughes were permitted to inspect and review your files on (deleted) and similar organizations and to discuss them with your staff members. We would appreciate your approval for doing this.

With kind regards,

Sincerely,

(Signed) Randolph W. Thrower
Commissioner

cc: Office of Commissioner
Mr. Paul H. Wright

UNITED STATES SENATE

Committee on
Governmental Operations

Senate Permanent Subcommittee
On Investigations

Washington, D. C.

August 8, 1969

Honorable Randolph W. Thrower, Commissioner
Internal Revenue Service
Department of the Treasury
Washington, D. C.

Dear Commissioner Thrower:

Thank you for your letter of August 1, 1969, in which you request approval for Mr. Paul Wright and others to review certain Subcommittee files and consult with staff members on matters of mutual interest.

I am pleased to advise you that I have directed the Subcommittee staff to comply with your request and make available any information we have which may be helpful to your investigation.

With best wishes for continued success, I remain

Sincerely yours,

John L. McClellan
Chairman

MEMORANDUM FOR FILE:

SUBJECT: *Activist Organizations Committee*

This Committee met in Room 3049 at 9:30 A.M. this morning under the chairmanship of Mr. Paul H. Wright. In addition to the permanent Committee, other persons identified below were present. The principal purpose of the meeting was to discuss what we are doing with representatives of the Senate Committee on Government Operations and to request their assistance and cooperation in this project. The following persons attended:

Mr. Paul H. Wright CP:C
Mr. Donald F. Cowles CP
Mr. William F. Gibney CP:I:O
Mr. Gilbert F. Haley CP:I:O
Mr. James J. McGarty CP:A
Mr. Donald O. Virdin CP:C:D
Mr.Thomas F. Casey CP:AT
Mr. Roy T. Orr, Internal Revenue Agent, Atlanta District
Mr. Edward D. Hughes, AT&F Investigator, Southeast Region
Mr. Philip R. Manuel, Senate Committee on Government Operations
Mr. John E. Drass, Senate Committee on Government Operations
Mr. Fred R. Miller, Senate Committee on Goverument Operations

Mr. Wright outlined the basic functions, plans, and composition of the Committee and what it hoped to accomplish. He pointed out that although the permanent Committee was composed of individuals from only four Compliance activities, it would be necessary to obtain help from all parts of the Service, including the Chief Counsel, Technical, Data Processing, Office of International Operations, and Appellate. Mr. Wright also outlined the following guidelines:

1. Because disclosure of official information will be involved, no changes in this regard will be made. If the Senate Committee on Government Operations or any other outside organization wants information concerning any taxpayer in which the Activist Organizations

Committee is interested, requests for disclosure of information must be made through regular channels and the Disclosure and Liaison Branch.

2. From now on, any informal arrangements for the exchange of data or any questions concerning the activities of the Committee which are desired by the Senate Committee on Government Operations will be made directly to Mr. Wright unless he directs otherwise. This is necessary so that close control can be maintained over the work going on.

3. As soon as permanent quarters and telephones have been established, this information will be furnished to Mr. Manuel.

4. The Internal Revenue Service's principal interest in this matter is to insure that all IRS laws have been complied with, that all income tax returns and payroll tax returns have been filed, that required information returns have been filed, that any income is reported properly. In addition, we will make an in-depth study of the sources of funds to support the activist organizations. As part of this, we will want to determine whether individuals contributing money have deducted contributions legally.

5. The permanent members of the Committee will be:

   Chairman—Mr. Paul H. Wright, Collection Division
   Mr. Edward D. Hughes, Alcohol, Tobacco and Firearms Division
   Mr. William F. Gibney, Intelligence Division
   Mr. James J. McCarty, Audit Division

6. Although the Committee has been created with an indefinite life, it is expected that the permanent members detailed from outside Washington will be working on a full-time basis at least until the end of November 1969. However, it is quite likely that this assignment will continue for a long period of time.

7. As information is assembled by the Committee on any specific organization, the principal investigating agent in the field will be called to Washington to review the data assembled, and it is expected that considerable travel may be done as part of the Committee's operations.

8. It was again emphasized that the Committee is not taking any function from any Compliance division or from any other part of the Service. What we are doing is trying to assemble all information available from within the Service, from the FBI, from the Department of Defense, from any other Federal agency having information, and from any Congressional committee having information. This data will be collated, analyzed, and given to the proper functional unit for attention.

Mr. Manuel, on behalf of the Senate Committee on Government Operations, offered the cooperation of the Committee and access to the Committee files. However, he plans to discuss this with Senator McClellan to obtain final clearance before giving IRS the green light, but he anticipates no difficulty. He described the method of filing used by the Committee, and it is planned that IRS representatives will inspect those files as soon as possible.

Mr. Manuel furnished several charts concerning the Black Panthers, the Students for a Democratic Society, and others, and offered to furnish additional material which we may request. He said the Committee has already published many volumes of hearings and we may obtain copies of these. The hearings which have just been concluded have not been printed, nor has the report been written, and it will probably be two or three months before they are finally issued.

In summary, it can be said that the Committee has been created and will begin full-scale operation as soon as the space has been made available. Also, from today on, any contact with other agencies having to do with the organizations in which this Committee is interested should be cleared with the Chairman, or made as directed by him. We do not want to have this rather sensitive matter handled loosely. Any questions may, for the time being, be directed to Mr. Wright in Room 5242, Extension 3897.

A copy of this memorandum has been delivered to each person attending the meeting, to each Compliance Division Director, and to each person not otherwise receiving a copy who attended the organizational meeting of July 24, 1969. However, copies will not be furnished to representatives of the Senate Committee on Government Operations.

/s/ D. O. Virdin
D. O. Virdin

COPIES FURNISHED TO

Mr. Paul H. Wright	CP:C
Mr. Donald F. Cowles	CP
Mr. William F. Gibney	CP:I:O
Mr. Gilbert F. Haley	CP:I:O
Mr. James P. McGarty	CP:A
Mr. Thomas F. Casey	CP:AT
Mr. Roy T. Orr	Atlanta District
Mr. Edward D. Hughes	Southeast Region
Mr. Charles E. Fink	D:C:P
Mr. Richard M. Hahn	CC
Mr. Thomas W. Hines	CP:AT
Mr. Paul L. Kane	T:MS:EO
Mr. Bernard L. Meehan	CP
Mr. Richard T. Stockton	T:I:I
Mr. Walter L. Stumpf	CP:AP:SA
Mr. Singleton B. Wolfe	CP:A
Mr. Arthur H. Klotz	CP:AP
Mr. Harold A. Serr	CPAT
Mr. Harold E. Snyder	CP:C
Mr. William A. Kolar	CP:I
Mr. Charles I. Fox	CP:IO

AFFIDAVIT

District of Columbia:

Alan and Margaret McSurely, each being duly sworn according to law, upon their oath depose and say:

1. We are the Plaintiffs in this matter.

2. Under date of November 25, 1974, one day before oral argument herein, there was filed with the Court a Motion for Leave to File a Supplemental Affidavit, with which affidavit there were included materials which had come into the Plaintiffs' possession a few days earlier as a result of revelations by the government in a freedom of information suit known as *Robert M. Brandon* v. *Internal Revenue Service and Donald C. Alexander,* Civil Action No. 74-1083, United States District Court for the District of Columbia. The Court has not acted on that motion.

3. The material included in that affidavit dealt with correspondence between the McClellan Committee and the Internal Revenue Service, as well as a "Memorandum for File" from the files of the I.R.S. describing a conference between the staff of the "activist Organizations Committee" of the I.R.S. and the staff of the McClellan Committee.

4. As pointed out in the memorandum to this Court submitted with that material, it appeared that the relationship between those two groups was generated on March 5, 1969, one day after we appeared before the McClellan Committee. At the time of the foregoing submission, we did not have the March 5, 1969, letter of Senator McClellan.

5. Following the submission of the foregoing material and on the afternoon of November 25, 1974, we received copies of additional material turned over by the Government in the freedom of information suit on that day, two items of which revelation are of decisive importance for this case.

6. Attached hereto and made a part hereof as *Exhibit A* is a Department of Justice letter dated November 25, 1974, to Larry P. Ellsworth, Esquire, transmitting the information; attached hereto as *Exhibit B* is a copy of the letter dated March 5, 1969, from Senator McClellan to the Secretary of the Treasury; attached hereto as *Exhibit C* is a fact sheet which appears to have been dated August 7, 1973,

entitled "Establishment of Special Service Staff." The authorship of this fact sheet appears to be within the I.R.S.

The importance of the latter two documents to this case becomes clear from the following:

a) Senator McClellan's letter is dated one day after we appeared before his Committee.

b) Senator McClellan's letter establishes a relationship between the Committee and the I.R.S. with respect to 22 organizations. Nine of these, namely, organizations 1, 2, 3, 4, 6 ,12, 13, 14, and 15, are involved in the documents[1] which had been seized from us and named in our subpoenas.

c) It now appears from the fact sheet that the Special Service Staff of the I.R.S. was not established as a result of instructions from the White House, as had been reported in the press, but emerged as a result of pressure from the McClellan Committee and the relationship established between that Committee and the I.R.S. beginning on August 28, 1968.

d) The pattern of that relationship emerges in communications of August 28, September 19, and September 27, and in a meeting on September 11, 1968, between Defendant Donald C. O'Donnell and Philip Manuel of the McClellan Committee and I.R.S. employees. The fact sheet shows the establishment of a close working relationship between the McClellan Committee and the I.R.S. which included "the exchange of data." Thus, as explained in the "Memorandum for file" of July 29, 1969,[2] Mr. Manuel "on behalf of the Senate Committee on Government Operations, [illegible] the cooperation of the Committee and access to [illegible] mittee files. While he had to check the matter with Senator McClellan, "he anticipates no difficulty. He described the method of filing used by the Committee, and it is planned that I.R.S. representatives will inspect those files as soon as possible."

e) The dates—August through September, 1968—are of enormous significance to this case. The decision of the Court of Appeals for the Sixth Circuit directing the Mc-

[1] Organizations 2, 3, and 4 were all related to the Student Non-Violent Coordinating Committee, and Organizations 14 and 15 were related to the Progressive Labor Party.

[2] This was included in the first supplemental submission to this Court as Exhibit C.

Clellan Committee to return to us our papers occurred on July 29, 1968. However, a delay of over three months occurred before we were able to obtain the return of our personal letters and other documents—finally on November 8, 1968, after they had been in the hands of the McClellan Committee for over a year! For the first time we have a clue to the cause of this three-month delay. It was *precisely during this period* that arrangements were made for inspection by the I.R.S. of McClellan Committee files authorized, according to the fact sheet (Exhibit C), by a letter from Defendant McClellan on September 19, 1968, and quickly acted upon by the Commissioner of I.R.S. on September 27, 1968, eleven days *before* copies of the 234 documents which had been unlawfully seized from us in Kentucky were finally returned to us.

/s/ Alan McSurely
ALAN MCSURELY
/s/ Margaret McSurely
MARGARET MCSURELY

Sworn to and subscribed before me
this 2nd day of December, 1974
Marilyn D. Mundy
Notary Public
Wash., D. C.

EXHIBIT A

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530
November 25, 1974

Address Reply to the
Division Indicated
and Refer to Initials and Number
SPC:JJMcC:DJGavin:sbc
5-16-854

Larry P. Ellsworth, Esquire
2000 P Street, N.W., Suite 700
Washington, D. C. 20036

Re: Robert M. Brandon v. Internal Revenue Service and Donald C. Alexander, Civil No. 74-1083 (USDC District of Columbia)

Dear Mr. Ellsworth:

The Chief Counsel, Internal Revenue Service, transmitted to this office this morning the enclosed seven documents to be transmitted to your client. Document Nos. one (1) through six (6) listed below would seem to fall within the description of the documents sought in paragraph 6 of the complaint. The March 5, 1969 letter, Document No. 7 below, while not apparently within the scope of the complaint, was referred to in documents previously furnished to you and accordingly, it is being transmitted with this letter. The seven documents enclosed are as follows:

1. Memorandum dated July 24, 1969.
2. Memorandum to the file dated July 29, 1969, signed by D. O. Virdin (This document has already been provided to plaintiff with the exception of the last page.)
3. Memorandum for the file dated July 31, 1969, with typed signature of D. O. Virdin.
4. Memorandum dated July 31, 1969, from Don Virdin to Mr. Snyder.
5. Memorandum for the file dated August 6, 1969, signed by D.O. Virdin.
6. Fact sheet dated August 7, 1973, entitled "Establishment of Special Service Staff."

7. Letter dated March 5, 1969, from Senator McClellan to Secretary of the Treasury Kennedy.

It should be noted that a paragraph on pages three through five of the fact sheet dated August 7, 1973 (Document No. 6) has been deleted from the enclosed copy of that document. This deletion has been made because this portion of the document relates to testimony before an Executive Session of the Senate Committee on Government Operations, and this information cannot be provided to a member of the public without the permission of the Senate Committee.

As Mr. Gavin of this office advised you by telephone this morning we will withhold filing the Stipulation of Dismissal you previously signed, pending further advice from you.

Sincerely yours,
SCOTT P. CRAMPTON
Assistant Attorney General
Tax Division
By: John J. McCarthy
JOHN J. McCARTHY
Chief
General Litigation Section

Enclosures

EXHIBIT B

UNITED STATES SENATE

Committee on
Government Operations

Senate Permanent Subcommittee
on Investigations

Washington, D.C. 20510

March 5, 1969

Dear Mr. Secretary:

In accordance with Executive Order 11337, dated March 27, 1967, a resolution was duly adopted by the Committee on Government Operations on September 18, 1968, with regard to the organizations listed on the attached pages. It should be noted that this request was made on December 16, 1968, prior to the expiration of Executive Order 11337. This is to reaffirm the same request pursuant to Executive Order 11454 dated February 7, 1969, and Treasury Decision 6133.

Pursuant to this resolution, I hereby designate the following individuals, members of the Subcommittee staff, to make such examinations: Mr. Philip R. Manuel, Mr. John E. Drass, Mr. Fred P. Miller, Mr. Perman H. Clay, Mr. James H. Dillon, and Mr. Walter S. Fialkewicz. In this connection, it will be appreciated if the files could be assembled in the district office of jurisdiction. In order to facilitate the work of the staff, it would be further appreciated if the staff designees be permitted to consult with Internal Revenue Agents and Auditors familiar with the content of the respective files.

Your cooperation in this matter will be greatly appreciated.

Sincerely yours,
John J. McClellan
Chairman

Honorable David M. Kennedy
Secretary of the Treasury
Washington, D. C.

1. The Student Non-violent Coordinating Committee,
   360 Nelson Street, Atlanta, Georgia
2. The Student Voice, Inc.,
   360 Nelson Street, S.W., Atlanta, Georgia
3. The Sojourner Motor Fleet, Inc.,
   360 Nelson Street, S.W., Atlanta, Georgia
4. The Southern Education and Research Institute, Inc.,
   859½ Hunter Street, Atlanta, Georgia
5. The Congress of Racial Equality,
   200 W. 135th Street, New York, New York
6. The Students for a Democratic Society,
   1608 W. Madison Street, Chicago, Illinois
7. The Black Panther Party,
   Oakland, California
8. The Revolutionary Action Movement,
   Philadelphia, Pennsylvania
9. The Deacons for Defense and Justice,
   Jonesboro, Louisiana
10. The Nation of Islam,
    634 E. 79th Street, Chicago, Illinois
11. The Afro-American Research Institute, Inc.,
    224 E. 46th Street, New York, New York
12. The Southern Conference Education Fund
    3210 West Broadway, Louisville, Kentucky
13. The Progressive Labor Party
    CPO Box 808, Brooklyn, New York
14. Rosen Publishing Company,
    336 Lenox Avenue, New York, New York
15. Tri-Line Offset Company, Inc.,
    461 West Broadway, New York, New York
16. The Medical Committee for Human Rights,
    New York, New York, with branch offices in Chicago, Illinois; Cambridge, Massachusetts; and Selma, Alabama
17. The Fund for Education and Legal Defense,
    30 E. 42nd Street, New York, New York
18. The Minutemen,
    Narbonne, Missouri
19. The American Nazi Party
    Arlington, Virginia
20. The United Klans of America, Inc.,
    Tuscaloosa, Alabama

21. The White Knights of the KKK,
    Laurel, Mississippi
22. The National States Rights Party,
    Savannah, Georgia

EXHIBIT C

Fact Sheet

Establishment of Special Service Staff

Allegations have been made that the Internal Revenue Service established the Special Service Staff from instructions received from White House officials. This simply is not true. The facts are these:

August 28, 1968. Mr. Philip Manuel, an investigator with the Permanent Committee on Investigations, Senate Committee on Government Operations, contacted the Service to say that he had a group of seven investigators working for him on matters pertaining to certain organizations and other groups; that he had prepared a letter for the Chairman of the Committee, Honorable John J. McClellan; and that he expected the request to be signed shortly. His call was to alert us to the fact that he wanted the Committee investigators to be permitted to discuss these matters with our District officials rather than to conduct inspection of returns in the National Office.

September 11, 1968. At the request of the Committee investigators, a meeting was held in Room 5213, Internal Revenue Service Building. Representing the Committee were Mr. Donald F. O'Donnell, Chief Counsel, and Mr. Philip Manuel, an investigator. Also present were Internal Service employees. The purpose of this meeting was to establish procedures so that when the formal request was received from Chairman McClellan prompt action could be taken by the Service.

September 19, 1968. The letter referred to above was signed by Chairman McClellan; received by the Commissioner of Internal Revenue on September 20, 1968; and by the Disclosure and Liaison Branch on September 24, 1968. A copy of the letter and a copy of the Resolution adopted by the Committee is available for inspection.

September 27, 1968. A response to this letter was signed by the Commissioner and mailed on September 27, 1968. On that same day instructions were sent to District Directors in all District offices concerned, authorizing them to

cooperate with designated Committee investigators. Copy of the response to Chairman McClellan and instructions to the District Directors are also available for inspection.

May 29, 1969. Honorable John J. McClellan, Chairman, asked for certain information concerning the Student Nonviolent Coordinating Committee and permission for designated Internal Revenue Service employees to testify before the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations.

June 20, 1969. In response to the letter of May 29, former Commissioner Thrower furnished the requested information and authorized Internal Revenue Service officials to testify in Executive Session. A copy of this letter is also available for inspection.

July 2, 1969. As a result of Assistant Commissioner Bacon's memorandum, a meeting was held in his office to discuss the information that had been developed; and on that date, there was general agreement that a National Office task force or group should be established which would collect basic information on the organizations of the type in which the Senate Committee on Government Operations was interested and to see that there was coordination between all Compliance activities and other affected parts of the Internal Revenue Service.

July 8, 1969. Another meeting was held in the office of the Assistant Commissioner (Compliance) to discuss this matter and to determine what should be done to implement the understanding reached at the meeting of July 2. Basically, the decision was made that some permanent group be established to coordinate these matters.

July 18, 1969. All Compliance Division Directors, the Chief Counsel, the Assistant Commissioner (Technical), and the Assistant Commissioner (Data Processing) were advised in writing by the Assistant Commissioner (Compliance) that a committee was being established to "coordinate activities in all Compliance Divisions" to insure that the requirements of the Internal Revenue Code concerning such organizations have been complied with.

July 24, 1969. An organizational meeting was held in response to Assistant Commissioner Bacon's memorandum

referred to above, and basic rules for functioning were established. Mr. Paul Wright had been designated by Assistant Commissioner Bacon as chairman of the permanent "committee" which, at that time, had not been given any formal name.

Thus the files of the Internal Revenue Service, which have been carefully reviewed, do not reflect in any way that the present Special Service Staff which was established in July 1969 was established at the direction of the White House. The present functions of this Special Service Staff are set forth in Manual Supplement , copies of which are available to the public.

This Special Service Staff, although it consists of only eight persons coordinating the various information, and although it was created solely for tax administration purposes, has received so much adverse publicity that within a few days after Commissioner Alexander took office he initiated a study of this group. A final decision has not yet been made, but one will be made shortly.

SEARCH WARRANT

COMMONWEALTH OF KENTUCKY,

TO THE SHERIFF, CONSTABLE, OR POLICEMAN OF
PIKE COUNTY, KY.

You are commanded to search, in the day or night time, the house, outbuildings, cabins, now occupied, used, maintained, controlled owned or managed by, ALAN McSURLEY, which property is described as follows: located in Pike County, Kentucky, which premises are located in Pleasant Valley, formerly known as Harold's Branch. This property belongs to A. T. Ewers and consists of two buildings and surrounding grounds, one building has four rooms and bath, is framed with wood siding painted white. The other building is constructed of cinder or concrete blocks for the first story and the second story is framed and the siding has been painted a tan color and consists of two rooms downstairs and one room and bath upstairs. This property is on the left hand side ascending Harold's Branch and is three-fourths of a mile from the Pikeville, Kentucky by-pass for routes U.S. #23, #119 #460. This property is across the branch from property owned and occupied by Estell Lee Carter, in Pike County, Kentucky, and if you find in or upon said premises seditious matter or printing press or other machinery to print or circulate seditious matter you will seize and take possession of it, and deliver it, together with the body of said, Alan McSurley together with this writ, to me at my office as speedily as possible.

Witness my hand this 11 day of August 1967.

Bill Pauley
Judge
Pike Quarterly Court
Pike County, Kentucky.

Order of the United States District Court for the Eastern District of Kentucky at Pikeville

(Filed—September 14, 1967.)

It is the Judgment of this Court that K.R.S. 432.040, under which the state criminal proceeding is based in this case, is upon its face overbroad, so vague and of such sweeping application as to run afoul of the provisions of the United States Constitution, which requires narrow and specific regulation in the field of protected activity.

We hold therefore that K.R.S. 432.040 is unconstitutional. We are further of the opinion that if K.R.S. 432.040 was constitutional, the Federal Government has preempted the law of sedition by enactment of the Smith Act, 18 U.S.C.A. 2385. We do not think the government of Pike County or the government of Kentucky can be overthrown without in part overthrowing the Government of the United States. Federal Courts therefore have exclusive jurisdiction in this field.

Being of the opinion that K.R.S. 432.040 is unconstitutional, we find under the circumstances of this case that *Dombrowski* v. *Pfister* is applicable and the doctrine of abstention is not applicable.

It appearing that the plaintiffs herein face imminent trial in the Pike Circuit Court, we are of the opinion that it is the duty of this Court to exercise its equitable power to prevent the trial from being held. It is therefore ordered and directed that the Commonwealth of Kentucky, and all courts of the Commonwealth, the defendants herein, and any and all persons acting in concert and accord with them be and they are hereby enjoined from taking any further action or proceeding in any manner against these plaintiffs under the statute in issue herein—K.R.S. 432.040, or any change or indictment based on said statute.

The motion of the plaintiffs that this court find the defendant, Ratliff, in contempt is denied.

The motion of the Commonwealth that this Court strike from plaintiffs' complaint as amended the reference to K.R.S. 432.040 and K.R.S. 432.030 is sustained.

The motion by the Commonwealth of Kentucky to dismiss this action as to it is overruled.

It is further ordered that the Intervening Plaintiffs, Carl Braden and Ann Braden, be released from the custody of the Pike County Jailer and Sheriff.

It is further ordered that all the plaintiffs be placed under bond to this Court in the amount of Five Thousand Dollars ($5,000.00) each on their own recognizance to make themselves amenable to the further orders of this Court.

It is further ordered that all books, papers, documents and other material now in the custody of the Commonwealth Attorney of Pike County, Ratcliff, reflected by the Inventory filed in this action continue to be held by him in safe keeping until final disposition of this case by appeal or otherwise.

This the 14th day of September, 1967.

BERT COMBS
Judge, United States Circuit Court
of Appeals, for the Sixth Circuit

JAMES H. GORDON
Judge, United States District Court
for the Western District of Kentucky

Judge Moynahan dissents from the foregoing order except that portion thereof which discusses the citation for contempt of Thomas B. Ratliff, in which portion of the order he concurs.

This the 14th day of September, 1967.

BERNARD T. MOYNAHAN, JR.
Judge, United States District Court
for the Eastern District of Kentucky

Inventory of items seized from the McSurelys by officials of the Commonwealth of Kentucky:

Books

290 volumes of False Witness by Harvey Matuson
1 volume of Red Star Over China—Edgar Snow
1 A Star to Steer By—Hugh Mulgae
1 Future American History—Philip S. Foner
2 The Role of Individuals in History)
The Materialist Conception of History)—Gregory Plekhanor
1 Tricks and Training for Cats—Morris L. Groder
1 The Tasks of the Proletariat in Our Revolution—V. I. Lenin
1 Confession of Faith—W. W. Woodward
1 The Fourth Branch of Government—Douglass Cater
1 The Rebel—Albert Camus
1 What is to Be Done—N. D. Chernyshevsky
1 The Diary of a Redman—Nokolai Gogal
1 Illusion and Realty—Christopher Gaudwell
1 Good News for Modern Man—American Bible Society
1 American Negro Slave Revolts—
1 Weapon—Herbert Aptheker
1 How United States Got Involved in Vietnam—Robert Schee
1 The United States in Vietnam—American Friends Service Committee
1 The Death Agony of Capitalism and the Tasks of the Fourth International (Pioneer Publishers)
Ramparts
Statements of a Religious Bodies in the Conscientious Objector
National Service Board for Religious Objectors
The Teachings of Karl Marx—Lenin
Catholics and Conscientious Objectors—H. Forest
2 volumes—Guide to Conscientious Objection
Marx as an Economist—Maurice Dobb
Communist Manifesto—Karl Marx
Soviet Documents — Frederick Engels — Crosscurrents Press
The Part Played by Labor in the Transition from Ape to Man—Frederick Engels

The Other Side—Staughton Lynn—Thomas Harper
Education of John Reed and Revolution in Spain—John Stuart
The Hoax—Marx and Engels
Lois Lawrence
TVA Democracy on the March—David F. Lillenthal
Mission to Hanoi—Herbert Aptheker
World Trade Union Movement—William Z. Foster
The Negro People in American History—William T. Foster
Old Father Antic—Lois Lawrence
Battle for the Mind—William Sargent
Man, Nature and God—FSC Northrop
Man's Search for Meaning—Vikton E. Frankl
Third Party Movements in United States—Will B. Hesseltine
Easter Week—Brian O'Neill
Quotations from Chairman Mao Tse-Tung
Capital Volume I and II—Karl Marx—Progress Publishers, Moscow
Capital Unabridged—Karl Marx
Volumes I, II and III
Is Communism the Next State—Jacob Budish
The Way of Zen—Adam Watts
Containment and Change—Carl Oglesby & Richard Shaull
Tactics of Extremism—Harry & Bonaro Overstreet
Progress or Poverty—Leon H. Keyserling
Grinnell College Bulletin
Vietnam—The Inside Story of The Guerilla War—Winfred G. Burchett
The Wretched of the Earth—Franz Fanon
The Makings of a Just Society—Chester Bowles
Freedomways
Letters to Americans—Marx and Engels
Malthus—Marx and Engels
Reader in Marxist Philosophy (From M. E. and Howard Solsam & Harry Martel—Lenin)
Economic Growth and Underdeveloped Countries—Maurice Dobb
16 volumes—Labor Fact Book—Labor Research Association
17 volumes—Labor Fact Book—Labor Research Association

International Regional Organizations—Ruth C. Lawson
Political Economy—John Eaton
Role of Individual in History—George Plekhanor
Materialist Conception of History—George Plekhanor
Problems of Contemporary History—R. Palmer Putt
Architecture and Form—Peter Blake
Militarism and Industry—Victor Perlo
Mill Town—Bill Cahn
Case of Joe Hill—Philip S. Foner
Mao Tse-Tung—Selected Works
Mission to Hanoi—(Combine)
Pre -Capitalist Economic Formations—Marx
18th Brunaire of Louis Bonaparte—Marx
Handbook for Conscientious Objectors
Selected Poems—Bertolt Brecht
Socialism—Utopian and Scientific—Engels
Foundations of Leninism—Stalin
Vietnam North—Wilfred C. Burchett
The Human Ideology—Marx and Engels
Ludwig Feuderbach—Engels
Three Who Made a Revolution—Bertram P. Wolfe
History of American Trolskism—James P. Cannon
Mao Tse-Tung—Volume II
History of Cuba I—Philip S. Foner
History of Cuba II—Philip S. Foner
Materialist Conception of History—S. Plek
Mill Town—Bill Cahn
Income Revolution—Victor Perlo
The Forest—William J. Pomeroy
Alderson Story—Elizabeth Gurley Flynn
True Believer—Eric Hoffer
Introduction to Marxism—Enele Burns
(Illegible)—The Spark Highway and the City—Lewis Mumford
The Same Poor—John Updike
Sidahanths—Herman Hesse
Asylums—Broina Goffman
Ancient Pagan Symbols—Elizabeth Goldsmith
Ideas They Cannot Sail—Eugene Dennis
How to Make Money in one Day at the Track—Charles S. Raomanelli
Hans and Rebels—Jessica Mitford

Peaceful Coexistence—John and Margrit Pittman
Psychotherapy East and West—Alan W. Watts
Theory of Knowledge—Maurice Cornforth
Poverty and Roots and Future—Hyman Lumer
The Open Society—Stanley Ryeson
Bureaucracy in Modern Society—Peter Blau
The Small Group—Michaels Olmsted
Brothers Karamazov—Fyodor Dostoyevsky
The Inheritance—Mollard Lampell
John L. Lewis
Soviet Documents—Vol. II—Kruschchev
Labor Fact Book No. 17—Labor Research Association
The Press—A. J. Liebling
Middletown—Orbert Lynd and Helen Lynd
Collected Poems of W. B. Yeats
Inside Story of Guerilla War—Wilfred G. Burchett
Yesterday's People—Jack E. Weller
Empire of High Finance—Victor Perlo
Compesea Nation—Sidney Finleston
The Magic Form—Phillip Bonosky
The Education of John Reed—John Stuart
Guerilla Warfare—Che Gurvara
The Potomac
A Star to Steer By—Hugh Mutae
Holmes Institute—Principals of Leadership
Stravinsky on the Theatre
Communist Manifesto—Marx and Engels
The Stormtrooper
New Politics News—Convention Center
Union for All Railroad Wor'.ers
Freedom School Poetry
Liberation—Independent Monthly—July-67—March-67
3 copies—Ramparts—Feb., Oct., Nov. 1966—Dec. 66
2 copies—Office, Chief of Ordinance and Principles of Leadership
Cap Grantees—Office of Economic Opportunity
Crime and Delinquency (Apr. 64—Oct. 1964)
Leader in Marxist Philosophy
The Paris Commune—V. I. Lenin
Studies on the Left
Value, Price and Profit—Marx
To the Rural Poor—V. I. Lenin

2 copies—Proletarian Revolution and Renegade—Kautsky—Lenin
In Friend's Vanguard—NAACP
Private Organization Providing Assistance In Indoor Recreation—Dept. of Interior
Freedom School Poetry
Mountain Education Program
Mission to Hanoi
The FBI Secret Service Coverup—Harold Weisberg
Dialectional and Historical Materialism—Stalin
Communist Manifesto—Marx
ETC—Charles L. Todd—Volumes I and II
To the Rural Poor—V. I. Lenin
Trends on American Capitalism—Labor-Research Association
War Elections—Lee Morton
101 Famous Poems—Roy J. Cook
2 copies—House Unamerican Activities Committee
2 copies—A Southerner Looks at Negro Discrimination—Geo. W. Cable
State and Revolution
Boys and Girls At Work in USSR—Alexei Antonv
I. W. W. Songs
18th Brumaire of Louis Bonaparte—Marx
ETC—Elisabeth Hartiett
2 copies—Value, Price and Profit—Marx
Negro Slave Revolts in U. S.—Hox
Soviet Documents
Head Start—Child Development Programs
The American Civil War—Herbert Aptheker
Coal Mines and Coal Miners
25 years of Industrial Unionism
The Big Wage Gyp—I. U. M. N. S. W.
The Union on the Job—I. U. M. N. S. W.
Science versus Idealism—Maurice Cornforth
Our Respected Society—Seymore Melonar
The Truth About Vietnam
The Mike Gold Reader
Salt of the Earth—Herbert Biberman
Ivan P. Pao 300
People on Guan Sapes—Wendell Johnson
Papa Wore No Halo—Susan H. Jefferies

Point of the Lance—Sargent Shriver
Giant at the Crossroads—M. Ilin F. Segal
2 copies—Existentialism and Alienation on American Literature—Sidney Findelstein
John Brown—W. E. Burghardt Du Bois
Ring of Truth—J. B. Phillips
The Negro on Southern Agriculture—Victor Perlo
Basic Writings of C. O. Jung
Economic and Philosophic Manuscripts of 1844—Marx
Illusion and Reality—Christopher Caudwell
The Ambassador—Morris L. West
Economic & Philosophic Manuscripts of 1844—Marx
Economic Growth in Underdeveloped Countries
2 copies—Critique of the Gotha Programs—Marx
18th Brumaire of Louis Bonaparte—Marx
Lenin—Marx Engels
Basic Writings of Sigmund Freud
Pennsylvania Avenue—Presidents Temporary Commission on Pennsylvania Ave.
Why I Am Not A Christian—Bertrand Russell
The Press and American—Emery and Smith
The World and Africa—W. E. Burghard Du Bois
Living Time and the Integration of the Life—Maurice Nicoll
Wage, Labor and Capital—Marx
Value, Price and Profit
Beyond the Chains of Illusion—Erich From
Metropolitan Transportation Problem—Wilford Owen
Guerilla Warfare—William S. Pomeroy
Introduction to Marxism—Emile Burns
Fear and Trembling The Sickness Unto Death—Kirkegard
Poverty Its Roots and Its Future—Hyman Lumer
Rice Grains—Amado U. Herman Hes
Gene Debs—Herbert M. Morris and William Cahn
Petrenius—Waters
Mans Wordly Bonds—Leo Huberman
Between Men and Man—Martha Buber
The Right of Nations to Self Determination—V. I. Lenin
The Woman Question—
The Life and Writings of Frederick Douglas

Man's Struggle for Shelter on an Urbaning World—Charles Abrams
Men & Revolution—John Lewis
Moves that Matter
1965—Peace Calendar and Appointment Book
Poetry & Prose—William Cullen Bryant
Guide—April 1967
Jeane Soles
The Correspondent
1—Notebook Binder and Contents
Draft Age Listen—American Friends Service Comm. Cambridge, Mass.
1—Film Box—containing 3 metal cannisters containing
Vaya Con Dios Part I, II, III
Guffanti Film Lab. New York, N. Y.
Address on box to Mrs. Margaret McSurely, Pikeville, Ky.
26—Posters Assorted sized black and white and colored
Smallest 14 x 20
Largest 30 x 24
Box No. 1—Wooden Book containing College Examinations and Review notes, cancelled checks, cancelled checks deposits slips of Alan McSurely until 1965
Box No. 2—Box contains 13 brown manilla envelopes containing items such as paid receipts, blank checks and personal correspondence, information on symphony orchestras and letters on campus politics
Box No. 3—Box contains newspaper clippings local and out of state—personal correspondence—John Birch coloring book
Box No. 4
A. Contains individual insert files containing program reports and progress reports.
1. Pike County
2. Summer Ideas
3. Project Response
4. Miscellaneous File
5. South West File
6. Why Not?
7. No. III—Manifesto For Radical America
8. Congress Heights
9. C.C.A.P.

10. Miscellaneous Items

Box No. 5

A. Contains printed literature and American magazines and newspapers.
   1. One insert file—Noon Minutes and J and BR Court No. 616
   2. Literature on Metropolitan Development

Box No. 6

A. File folder A to Z on forms and information on training and projects and general information about the office.

Box No. 7

A. Literature on urban American environment and newspaper clippings also literature on a conference to improve quality of urban America.

Box No. 8

A. Box containing assorted literature, guitar courses, poster design and manufacturer, carbon paper, and National Magazines, U.P.O. Planning Memos, and Pictures and Personal Correspondence.

Box No. 9

A. Folder containing 15 lapel buttons of Black Power inscribed SNCC.

Box No. 10

A. Contains files and Index cards on humans or indivduals, pictures. A banner on the March on Washington, income tax statement (1964) Mimeographed literature.

Box No. 11

A. Contains cancelled checks and personal banking information of Mr. and Mrs. Alan McSurely of Pikeville, Kentucky and Mrs. Margaret H. Laughum of Washington, D.C., also insurance information of the above.

Box No. 12

A. Contains Questions and Answers on Vista, National Magazines, rough drafts, personal correspondence, newspaper clippings, The Freedom Government and information on the free school.

Box No. 13

A. Contains a Washington yellow page telephone directory, assorted paper back books such as the Bitter War, Negro Military Servicemen, and Racial Discrimination in Housing, National Magazines, personal correspondence, newspapers and other civil rights literature, also Antipoverty program.

Box No. 14

A. Contains assorted handbills, literature on Bureau of Mines, a book entitled The Southern Apalachian Region, and National Magazines, and a Williamson Daily newspaper dated Wednesday, August 16—Caption reads Sedition Case.

   Handbills as follows:
   1. 37—How to Put out Community News
   2. 94—Compare the Candidates is the headline of a political advertisement of a Louisville Times dated May 10, 1967.
   3. 54—The Third Reconstruction
   4. 27—Seeds of Democracy
   5. 1—Booklet on Freedom of Choice and Housing which is a Manual for Negro House Seekers.

   Rough notes and Files, a notebook and an outline of information on Juvenile Delinquency Problems in the United States.

Box No. 15

A. One box of national newspapers and magazines and one piece of plate glass, and a U.M.W.A. Journal, also a handbook on legal right of the poor in the Kentucky mountains.

Box No. 16

A. Box contains national magazines, printing equipment as ink, blotter, and two cans of Dri-Fast Ink, a Workbook on Maryland-National Capital Park and Planning Commission, 150 4" x 8" envelopes with the return addresses as follows: Southern Conference Educational Fund, 3210 W. Broadway, Louisville, Kentucky 40211, one bookend, ashtrays, civil rights literature and brochure on Metropolitan Washington, an annual report of the Council of Governments.

Box No. 17

A. Index files—One of the Far North East and another of Personal correspondence. A file of three short plays by Alan McSurely entitled:
   1. The Bathroom
   2. We, I, We
   3. I Was Late

B. Personal correspondence of Keystone Securities Incorporated.
C. First Drafts File
   1. Rough Draft of personal correspondence.

Box No. 18

A. Handbill Literature
   1. 5 Books on Bituminous Coal Facts of 1966
   2. 37 Copies of Kentucky Public Assistance Benefits on Medical Assistance Programs
   3. 46 copies of Kentucky Public Assistance for Aged, Blind, and Disabled
   4. 16 Copies of Kentucky Public Assistance on Civil Rights
      a. All this material published by Commonwealth of Ky.
   5. Copies 177 of Coal
   6. 100 Copies of New Uses for Good Earth
   7. 62 pamphlets of Poverty Affluence Applachian Wonderland by Harry M. Caudill and William C. Blizzard
   8. 29 copies of Coal origin of valuable natural resources
   9. 58 copies of page inserts of training manual
   10. 36 Handbills of Poor People's Corporation
   11. 188 pamphlet of Map of Coal Areas in the United States
   12. 1 House Un-American Activities Committee
   13. 64 SNCC Acts on Draft a newspaper
   14. 17 copies of Find Out the Facts Before its Too Late
   15. 4 copies of Coal Aid to Higher Education
   16. 7 Assorted copies of newsletter Nation
   17. 65 copies of Four Kentucky Miners Face Prison Terms

Box No. 19

A. Handbills and Newsletters
   1. 9 copies of the Children of Vietnam
   2. 7 copies of the Vietnam Report
   3. 60 copies of the Southern Patriot
   4. 4 copies of the Government of the Black, By the Black, For the Black
   5. 6 copies of Changes

   6. 3 copies of the Deep South Patriot
   7. 36 copies of Marian Davis Scholarship Fund.
   8. 4 Medical Problems of South Vietnam dated January 1967.
   9. 1 copy of American Liberal
   10. 2 copies of Considerable Comment on Selective Service.
   11. 2 copies of Questions and Answers on Vietnam.
   12. 2 copies of We Burned Every Hut.
   13. 1 copy of Vietnam: The Case of Extrication.
   14. 2 copies of The United States and Vietnam
   15. 2 copies of Catholics and Conscientious Objection.
   16. 1 copy of American Lifelines—Federal Aid for Highways.
   17. 2 Magnetic Recording tapes of a 7 inch reel, one in carton, entitled Forty Cents a Ton, the other title
   18. 100 bundles of Getting People Together.
   19. 24 bundles of Introduction.
   20. 2 bundles of Maximum Feasible Participation.
   21. 125 pages of Page 3 of Getting People Together.
   22. 320 pages of Page 2 of Getting People Together.
   23. 300 pages of Page 1 of Getting People Together.
   24. 540 pages of Introduction.
   25. 3 pamphlets on Water, Poverty and Political Power in Appalachia.
   26. 129 pages on Maximum, Feasible Participation.
   27. 10 on Join the Struggle for a Decent War.

B. All information following on a pamphlet of the political union.
   1. 24 sheets of A New Political Union.
   2. 37 sheets of Page 3.
   3. 24 sheets of Page 7.
   4. 18 sheets of Page 8.
   5. 4 sheets of Page 9.
   6. 24 sheets of Page 10.
   7. 32 sheets of Page 11.
   8. 24 sheets of Page 4.
   9. 34 sheets of Page 13.
   10. 27 sheets of Page 16.
   11. 47 sheets of Page 17.
   12. 32 sheets of Page 14.
   13. 32 sheets of Page 13.

C. 39 Copies of Life with Lyndon and the Great Society.
D. One green metal filing cabinet, consisting of two drawers of files.
   1. Consists of rough drafts, personal correspondence, typewritten correspondence, and newspaper clippings.
E. One brown file cabinet.
   1. Consisting of two drawers. (each drawer approximately half full)
      a. Organizational literature, procedure manuals and assorted road maps.
F. File drawer on Mr. Joseph Mulloy of Pikeville, Kentucky.
   1. Information on file as follows:
      a. A—Appalachian Freedom School
      b. AV—Stories
      c. AV—Workers
      d. AV—Policies
      e. AV—Proposal—What is?
      f. CAD
      g. CAD
      h. Community Newspapers
      i. Bob Cole's evaluation
      j. Appalachian Stories
      k. Information on South
      l. Marrabone News
      m. Island Creek News
      n. By-laws
      o. Join Newsletter
      p. Join Chicago Newsletter
      q. Left over notes
      r. Highlander
      s. Pike County
      t. Pike County
      u. AV Board
      v. Poverty—Rights Actions
      w. SNCC
      x. Organizing in a White Community
      y. U.M.W.A. Unions
      z. Coal
      AA. Taxes and Insurance Information
      BB. Strip Mining

      CC. O.E.C.—Vista Publicity
      DD. Wise County
      EE. S.D.S.
      FF. Developing Organization in the Ghettos
      GG. Automobiles
      HH. General Correspondence to Joe Mulloy
      II. Al McSurely
      JJ. Last file had no caption
   2. Back of drawer contained the following books.
      1. Mao Tse-Tung—Anne Fremantle
      2. Catch-22—Joseph Heller
      3. Socialist Thought—Albert Fried and Ronald Sanders
      4. Essential Works of Lenin—Henry W. Christian
      5. The Berkely Student Revolt—Seymour Martin Lipset and Sheldon S. Wolin
      6. Great Russian Short Stories—Morris Houghton
      7. Corridors of Power—C. P. Snow

Box No. 20

A. Contains Handbill Literature either damaged or soiled by folding or by walking, notebook binder and typewritten information termed The Organizer's Wor. - book.
B. One small blue binder containing typewritten and handwritten addresses and phone numbers of individuals.
   1. This binder is half full.

Box No. 21

A. A small brown box of inventoried exhibits displayed at Lexington, Ky. as marked.

Box No. 22

A. Contains 29 individual folders of personal information programmed and counted by the Commonwealth of Kentucky Attorney Mr. Thomas B. Ratliff and his assistants includes small notebook of personal memos of Mrs. Margaret Laughum McSurely of Atlanta, Georgia.

All the above articles and literature will remain in the custody of Thomas B. Ratliff, Commonwealth Attorney, Pikeville, Ky.

Items to be returned by Thomas B. Ratliff Commonwealth of Kentucky Attorney to the plaintiffs in the above

styled case by way of the office of Mr. Dan Jack Combs attorney for the plaintiffs of Pikeville, Kentucky.

1—Large bread box containing personal items such as pictures, pencils, bookends, unused paper, unused memo books, assorted literature and manuals distributed by Commonwealth of Kentucky.

Also items of personal nature to Mrs. McSurely—unused checks and bank books, road maps and secretarial aids.

1—Wardrobe bag—scotchplaid full of clothing and personal belongings

This inventory was conducted by Thomas B. Ratliff, Thaddeus Scott, Deputy United States Marshals, Joe R. Mullins and Ernest S. Mike under the supervision of Mr. Archie Craft United States Marshal for the Eastern District of Kentucky on September 12, 1967 in the Pike County Courthouse at Pikeville, Kentucky.

/s/ ARCHIE CRAFT
Archie Craft
Eastern District of Kentucky

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. ALAN MCSURELY, *et al.* DEFENDANTS.	Criminal Nos.: 1376-69 1377-69 AFFIDAVIT

MORTON STAVIS being duly sworn deposes and says:

1. I am one of counsel to the defendants in this matter.

2. Defendants in this case have been charged with contempt of congress in that they failed to respond to a subpoena.

3. Heretofore certain proceedings were had in this matter as a result of which the United States Court of Appeals in the District of Columbia issued its opinion under date of March 26, 1970, No. 23, 845.

4. One of the several issues in the within prosecution concerns the validity of the subpoena in the light of the following:

a) The defendants were the object of a prosecution by the State of Kentucky in connection with which certain documents and records of theirs were seized.

b) The prosecution was found to be unconstitutional by the United States District Court for the Eastern District of Kentucky.

c) After the prosecution and its attendant search were found to be unconstitutional, agents of the Senate Sub-Committee surreptitiously examined the documents which had been unlawfully seized by state officials.

d) The subpoena issued by the Senate Sub-Committee is itself unlawful because it was based upon the inspection of documents which were unconstitutionally seized.

5. The Court of Appeals in its opinion summarized this argument as follows:

> "the documents in issue were originally taken from their possession in an unlawful search and seizure by

agents of the State of Kentucky;* that the information upon which the present subpoenas are based stems from an examination of the illegally seized documents by a staff member of the Senate Subcommittee after the seizure had been declared unconstitutional; and that, therefore, the subpoena is unlawful.**

(slip sheet opinion, P. 7)

6. Heretofore in all prior proceedings in this matter the Government has contended that the subpoena was not unlawful because there was an independent factual basis upon which the subpoena was composed. For example, in its brief submitted by the Government in the United States Court of Appeals for the Sixth Circuit, in the case known as McSurely v. Ratliff, 398 F.2d 817, the Government said:

> "Here the record established that the other information possessed by the Subcommittee concerning appellants and the various organizations involved provides an "independent source" supporting issuance and enforcement of the subpoenas."

7. In view of the position of the Government to date, the defendants had been proceeding upon the assumption that the Government at the time of the trial would attempt to prove facts to establish the foregoing position.

8. In response to a motion to dismiss, heretofore made in this case, the Government recognized this issue and stated the following:

> "The question of whether the subpoena is invalid because the original seizure of the records was invalid is not directly presented by this motion. It will undoubtedly come up in the course of the trial. Assuming the invalidity of the original seizure of the documents by the Kentucky authorities, it may become necessary to establish that the connection between that seizure and the subcommittee subpoena is "so attenuated as to dissipate the taint." *Nardone* v. *United States*, 308

* See McSurely v. Ratliff, 398 F.2d 817 (6th Cir. 1968); McSurely v. Ratliff, 282 F. Supp. 848 (E.D. Ky. 1967).

** Elkins v. United States, 364 U.S. 206, 215, 221-23 (1960); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920).

U.S. 338, 341 (1939); cf *Clemons* v. *United States*, — U.S. App. D.C. —, 408 F.2d 1230 (1968), *cert. denied*, 394 U.S. 964 (1969).

9. Following the decision of the Court of Appeals herein, the defendants made their motion now pending before this Court seeking pretrial inspection of documents pursuant to rule 17C and pretrial depositions.

10. In response to the foregoing motion the Government has now filed a document in which it states the following:

> "The Government concedes—and is willing so to stipulate—that but for the opportunity to examine the documents which was afforded to the subcommittee staff as a result of the seizure by agents of the Commonwealth of Kentucky, the subcommittee would not have known of the existence of said documents and hence would not have issued a subpoena for their production."
>
> See memorandum by Mr. Bress, P. 3.

11. The position now stated by the Government makes it clear that there is nothing left to try in this case.

12. The Government now concedes that it "would not have issued a subpoena" for the production of the documents except for its having examined them after they had been seized by agents of the Commonwealth of Kentucky. The unlawfulness of their seizure is a matter which has been adjudicated and which the Government now concedes. The subpoena cannot stand in the light of *Silverthorne* v. *United States*, 251 U.S. 385.

For the foregoing reasons it is respectfully submitted that the indictments herein should be dismissed.

MORTON STAVIS
N.P.—Seymour Hochberg

State of New York
County of New York
Sworn to and subscribed
before me this 24th day of
April, 1970.

[726] JOHN BRICK

was recalled to the witness stand by the Government, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BRESS:

Q Mr. Brick, you have heard some testimony here about your having, and I think the word was that you stole certain records.

A That was the word, sir.

Q That you had stole from some authorities who had custody of records in Kentucky.

MR. STAVIS: I object, Your Honor. That was not the testimony. They were stolen from the McSurelys. They were not stolen from the Kentucky authorities and I don't think he [727] ought to misstate what the testimony was in a question.

MR. BRESS: Maybe we can stipulate.

Do you say that your clients, neither of them, testified that Mr. Brick stole some records?

MR. STAVIS: I didn't say that they didn't so testify. They did not say that they were stolen from Kentucky officials. The records were stolen from the McSurelys.

MR. BRESS: That Mr. Brick stole them from the McSurelys?

MR. STAVIS: They had first been stolen by the Kentucky officials and he in turn took them from them. He stole them from the McSurelys, yes.

THE COURT: It is the jury's recollection of the facts that will control.

MR. BRESS: I wanted to be brief since there was some reflection on this member of the Committee staff and I thought for that reason I should bring him back.

BY MR. BRESS:

Q I am not sure now whether they said that you stole them from the State or from the McSurelys, but in any event, did you steal any records from anybody?

A. No, sir.

Q There was, as you heard, evidence that you brought to

Washington from Kentucky, and it is supposed to be a batch of 234 documents, some of which involved personal letters?

[728] A That is correct.

Q With respect to that batch of documents, my questions are, one: Did you play any part at all in the selection of those documents?

A No, sir.

Q From whom did you get those documents?

Did you request them or demand them or were they offered to you?

A They were offered to me. I did not request them or demand them.

Q When you got them, did you take them back to Washington?

A I did.

Q From whom did you get them?

A I got them from Thadeus Scott, the Commonwealth Detective in Pike County.

Q Do you know whether or not Mr. Scott was authorized by the States Attorney's office, the law enforcement people, to let you inspect the records or to give you any part of the records?

A I did.

I was so informed. As a matter of fact, the Assistant Commonwealth's Attorney, Mr. Dotson, was with me most of the time while I was inspecting the records.

Q I gather you not only inspected these 200-and-some items, but all the rest of the items?

[729] A I wouldn't want to say all. I would say almost all. I may have missed some of them. I did not inspect the records of a man named Joseph Malloy. They were mixed in with these. I had no interest in those.

Q These records were obtained in the manner you have described in what month?

A In October of 1967.

Q And did they—did there come a time when you returned those documents?

A Yes, sir.

Q During the time that you had possession of the documents, were they publicly—publicized, distributed or seen by anybody outside of the Committee?

A No, sir, and not by anybody inside of the Committee, either.

Q Where were the documents maintained?

A In my personal file under lock and key and the key was always in my pocket and that was by order of Senator McClellan.

Q Did Senator McClellan look at those records?

A No, sir. He looked at one.

Q Did there come a time when you—after the expiration of certain litigation between the McSurelys and the officials in Kentucky, did you then return that batch of documents to the authorities in Kentucky?

[730] A I did.

I returned them to Thadeus Scott on August 14, 1968.

Q And is the receipt that has been marked listing the 230-some documents, is that the receipt that you got when you returned them?

A That is the receipt I prepared and he signed, yes.

Q Did you retain any of the documents thereafter or did you make any copy of any documents and retain them in your file?

A I never made a single copy of any of those documents.

I retained none. I have not now and the Subcommittee has none.

All the documents were returned to Mr. Thadeus Scott.

I have never used a Xerox machine on those documents, although it has been said here a number of times that I did.

I did not.

MR. BRESS: I think that is all I have.

CROSS-EXAMINATION

BY MR. STAVIS:

Q What was the one that you showed to Senator McClellan?

A That was a letter.

Q Which one?

A If you will show me the list, I will tell you.

No. 201.

Q That is a letter dated—

[731] MR. BRESS: May we approach the Bench?

MR. STAVIS: May I identify what it is?

THE COURT: You will approach the Bench first.

(At the Bench:)

MR. BRESS: First, any particular item that may have been shown to a Senator is not relevant.

The witness was called for the purpose of refuting the fact that he had not stolen any records and what the custody of those records were.

I think that if there is one item involving a personal letter that may have been shown, I think that it would be prejudicial to the person involved in this case and possibly to people who are departed.

THE COURT: Yes. Actually, the prejudice would be to the defendant herself and the name signed here is Drew.

It could be Drew Pearson that has been referred to here, but that is not clear.

In any event, this Exhibit is in evidence.

Your objection is noted and overruled.

(In open Court:)

MR. STAVIS: May I read it?

THE COURT: Yes, you may.

MR. STAVIS: No. 201, is a letter dated, "October 6, 1964, on flight letterhead of North Central Airlines, addressed Dearest Cucumber and signed Drew."

[732] BY MR. STAVIS:

Q I take it, Mr. Brick, that you showed that letter to Senator McClellan as part of his duties to investigate the causes of riots in the United States?

MR. BRESS: I object.

THE COURT: The objection is sustained.

If there is any further interruption in this courtroom, the courtroom will be cleared.

You are entitled to be here as long as you conduct yourselves as you should in a courtroom, but if there is any further laughter in the courtroom, it will be cleared.

MR. STAVIS: Your Honor, I had no idea that would occur.

THE COURT: This is the last warning I will give.

You may proceed.

BY MR. STAVIS:

Q For what purpose did you show that letter to Senator McClellan?

A For—well, first of all, to inform him about it, of course.

It was a letter involving a person—a person prominent nationally and I didn't want to have it, without his knowing that I had it.

Q Have you finished?

A He told me to lock it up and, as a matter of fact, [733] he gave me different instructions on that. And that was in addition to locking it up, he told me to put it in an envelope to be marked only to be opened by John Brick.

It was to be opened only by John Brick, J. S. Adams, General Counsel and Senator McClellan.

Q You showed him the letter?

A Yes, sir.

Q You didn't just tell him that you had the letter?

A No, sir. He didn't read it. He glanced at it.

Q He did glance at it?

A Yes.

Q How long a letter was it?

A It was—

MR. BRESS: I submit, Your Honor, this is—

THE COURT: I will allow some latitude.

THE WITNESS: My memory fails me, Mr. Stavis, on that.

I don't believe I ever looked at it again after I put it in that sealed envelope.

BY MR. STAVIS:

Q Did you know who the Drew was?

A Yes, sir.

Q Who?

MR. BRESS: I object.

THE COURT: The objection is sustained.

[734] BY MR. STAVIS:

Q You knew, did you not, that Drew Pearson had written numerous columns attacking Senator McClellan, did you not?

MR. BRESS: I object, Your Honor.

THE COURT: The objection is sustained.

You will disregard that last question, members of the jury.

BY MR. STAVIS:

Q And did Senator McClellan say anything about Drew Pearson when you showed him that letter?

MR. BRESS: Objection. Irrelevant.

THE COURT: The objection is sustained.

MR. STAVIS: Now, when you—I think you testified that you played no part in the selection of the 234 documents that were handed to you?

A That is correct.

Q And they were handed to you on what day?

A On October, Sunday the 8th and Monday, the 9th. The year, 1967.

Q And when they were handed to you, did you look at what it was that you were receiving?

A Yes.

Q You looked through that whole list?

A Yes.

Q Did you tell Mr. Dotson or any of the folk with whom [735] you met there that there was some of that stuff that you didn't think that you needed?

A Yes.

Q Did you give it back to them?

A No.

Q Did you need that letter signed Dearest Cucumber or addressed, Dearest Cucumber?

MR. BRESS: Objection. Irrelevant.

THE COURT: He may answer the question.

THE WITNESS: No.

Didn't you say signed Dearest Cucumber and when in fact it says addressed to Dearest Cucumber.

MR. STAVIS: No, I didn't.

THE WITNESS: Was the question, did I need that letter?

BY MR. STAVIS:

Q Yes. For the performance of your duties.

A No, sir.

Q As a matter of fact, in respect to the performance of your duties, you didn't need most of the items in that list, did you?

A Some of them.

There were many others in the locked vault in the Court House that I would have obtained under the subpoena.

Q That what?

A That I would have obtained under the subpoena had not [736] the Subcommittee stopped all action when the defendants went into Court.

Q Did you—when I was asking my questions about this list of 234 items, there were lots of these items that you didn't need at all, correct?

MR. BRESS: Objection. Irrelevant.

THE COURT: I believe he has already answered the question.

BY MR. BRESS:

Q What was your answer?

A Some, yes.

Q Some that you did?

A It was ——

Q Lots?

A I object to the use of the word lots.

Q A great many, a good many?

A Oh, I will say many.

Let me explain.

I didn't select any of these as I told you.

Q Now, what duties were you performing in Pikeville when you were picking up these letters?

MR. BRESS: Objection. Irrelevant.

THE COURT: Well, I will allow some latitude.

The objection is overruled.

You may answer.

[737] THE WITNESS: I was—I went to Pikeville to examine the documents in the Court House.

BY MR. STAVIS:

Q While there, you received these documents?

A Yes.

Q Had you told Mr. and Mrs. McSurely that you were coming to Pikeville?

A No.

Q Had you told Mr. and Mrs. McSurely that you were looking at their papers?

MR. BRESS: I believe this is all meaningless.

MR. STAVIS: Excuse me.

THE COURTS He may answer the question.

THE WITNESS: No.

BY MR. STAVIS:

Q You knew these were Mr. and Mrs. McSurely's papers?

A I knew they had—that they had been seized from them, yes.

I didn't know that they all belonged to them. Some of them belonged to a Joseph Malloy.

Q We are talking only about the McSurelys' papers?

A Right.

Q And before you examined their papers, you had seen an order, had you not, dated September 14, 1967?

A No, sir. That was later. That was my last action in [738] Pikeville on that first visit.

Q When did you examine the file of the United States District Court for the Eastern District of Kentucky?

MR. BRESS: Objection.

THE COURT: The objection is sustained.

BY MR. STAVIS:

Q Before you left Pikeville with these 234-odd papers, had you become aware of the fact that the United States District Court for the Eastern District of Kentucky had ruled——

THE COURT: Just a minute. The objection is sustained.

MR. STAVIS: May we approach the Bench?

THE COURT: Yes.

(At the Bench:)

THE COURT: This has been ruled out continuously throughout this trial, Mr. Stavis. You know that.

MR. STAVIS: All right.

(In open Court:)

BY MR. STAVIS:

Q I think your testimony was that you inspected all the rest of the documents in addition to those documents that were given to you?

A Most of the—Mr. Stavis, as I say, I may not have examined everyone carefully.

Q And you were free to take copies of anything that you chose to take?

[739] A No, sir.

Q Did you ask for copies of any of the documents?

A No.

I planned to return to Pikeville with the subpoenaes.

Q They had a Xerox machine in the office there, didn't they?

A I don't know.

Q They handed you Xerox copies—Mr. Dotson handed you Xerox copies?

A Not Mr. Dotson, but Mr. Scott.

Q In the presence of Mr. Dotson?

A No. He only in my presence in my motel room——

Q Mr. Scott handed you these papers in your motel room?

A Correct.

Q And the next day you went to the Court House, is that correct?

A Correct.

Q And examined the rest of the papers?

A Correct.

Q And you didn't ask for any other copies?

A No, sir.

MR. STAVIS: No further questions.

MR. BRESS: That is all.

THE COURT: You may step down.

MR. BRESS: The Government rests.

[740] MR. STAVIS: I have one last question.

BY MR. STAVIS:

Q You have authored a number of books, haven't you?

A 23.

Q Is one of them entitled, "The Raid"?

A Yes, and one is entitled, "The Richmond Raid."

MR. STAVIS: Thank you.

MR. BRESS: One moment.

REDIRECT EXAMINATION

BY MR. BRESS:

Q I had forgotten to ask you this.

You heard some description of the silly snicker or silly smile or something on your face.

A Yes.

Q That was at the time of the service on Mr. McSurely?

A I heard that.

Q Is that true? Is that true?

MR. STAVIS: That is beyond the scope of redirect.

THE WITNESS: No.

THE COURT: He said it is a question he overlooked.

The objection is overruled. You may answer.

BY MR. BRESS:

Q Answer the question.

A I heard the testimony, yes.

Q Is it true?

[741] A No.

RECROSS-EXAMINATION

BY MR. STAVIS:

Q Is that about the smile that you had just then?

A I beg your pardon?

Q Is that the way you are smiling now?

A That is just the way everybody smiles.

MR. BRESS: I object.

THE COURT: The objection is sustained.

Does that complete the examination of this witness?

MR. STAVIS: Yes.

MR. BRESS: Yes.

THE COURT: You may be excused.

THE WITNESS: Thank you, Your Honor.

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SUPREME COURT OF THE UNITED STATES

No. 76-1621

John L. McClellan, et al.,

Petitioners,

v.

Alan McSurely, et ux.

ORDER ALLOWING CERTIORARI. Filed October 11, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia—Circuit is granted.

☆ U.S. Government Printing Office: 1977—230-760/99

Supreme Court, U. S.
FILED
DEC 27 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

Volume II

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1621

SENATOR JOHN L. MCCLELLAN, ET AL., PETITIONERS

v.

ALAN MCSURELY AND MARGARET MCSURELY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED MAY 19, 1977
CERTIORARI GRANTED OCTOBER 11, 1977

In the Supreme Court of the United States

OCTOBER TERM, 1977

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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*Pages 1-106 of the Appendix are printed in Volume I.

[611] * * * ALAN MCSURELY was called as a witness by the Defendants and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. STAVIS:

Q. You are Alan McSurely?

A. Yes.

Q. And a defendant in this case?

A. Yes.

[612] Q. How old are you?

A. I am 33 years old.

The COURT: Mr. McSurely, if you would talk into the microphone, I think the juror on the end and all the counsel would be able to hear you better.

By Mr. STAVIS:

Q. What was the answer to that?

A. I am 33 years old.

Q. And what is your present occupation?

A. I am a shoolteacher for the sixth grade in New York City.

The COURT: Speak into the microphone so we can hear you.

The WITNESS: I teach the sixth grade in New York City.

By Mr. STAVIS:

Q. What school is that?

A. It is a school called Walton School.

Q. And when did you start teaching there?

A. I began teaching there in February of this year.

Q. What did you do before that?

A. Well, I taught the eighth grade, mathematics in Prince Georges County from September to February and before that I had a job in a factory in Lexington, Kentucky.

Before that, I was an organizer in Pikeville County, [613] Kentucky for the whole southern mountain region in West Virginia and western Virginia, Kentucky, and Tennessee.

Q. What were you—go ahead.

A. Before that, we are back into '64 and '65 and '66 now. I was working for the United Planning Organization in Washington.

I was helping organize all of the poverty programs, the head start programs in Washington and all the suburbs of the District and then I was a Director of the suburban programs for about two years and then I worked up—worked in setting up the Neighborhood Planning Council of the District, and it was divided into 20 sections so that the citizens that lived in the various communities could have some control over the programs that went on in their own neighborhoods.

My wife and I helped set those things up with the help of the D.C. Recreation Department, the School Board and the D.C. Government and other D.C. agencies.

Q. That brings you back to what year?

A. Well, I started to work at UPO in December of '64 and prior to that, I was a probation counselor with the Juvenile and Domestic Relations Court in Fairfax, Virginia, in which I worked with young people and their parents who had gotten into trouble.

Q. The young people got into trouble and not the parents?

A. Sometimes parents, too.

[614] Prior to that I was a schoolteacher in Washington at the Capitol Radio Engineering Institute and prior to that I was a mailman, letter carrier in Arlington and a taxi driver in Arlington and Washington.

Prior to that I went to school in Chapel Hill, North Carolina.

Q. When did you graduate from Chapel Hill in North Carolina?

A. In 1959.

Q. And have you been extending your educational activities since then?

A. Yes.

When I started to work at the Juvenile Court in Fairfax, I began working on my Master's Degree in psychology at G.W. and have been working on that ever since.

I am writing my thesis right now on schools.

Q. What is your thesis about?

A. The thesis is about the need for parents and teachers and students to form alliance together to help change the schools and particularly in the major cities because the schools have become sort of irrelevant to the needs of the kids and needs of the community and to try to use that alliance, that is, parents and teachers and students to begin to fight against the

school board and the city Governments that have been controlling the schools for so long, so that the schools [615] will meet the needs of the people.

Mr. STAVIS. Will you mark this for identification.

(Whereupon, Defendant's Exhibit No. 2 was marked for identification.)

By Mr. STAVIS:

Q. Mr. McSURELY——

The COURT. Would you show that to counsel.

Mr. STAVIS. I will have it marked first.

The COURT. I think it should be shown to counsel.

(Whereupon, the Exhibit was shown to Mr. Bress.)

Mr. BRESS. May we approach the Bench?

The COURT. Yes.

(At the Bench:)

Mr. BRESS. Your Honor, I object to any use of this kind of an Exhibit.

The Exhibit is, appears to be a typed or mimeographed volume entitled, "Neighborhood Planning Guide Book".

I did not object during the direct examination thus far of this witness. I think it is to me an aggressive calculated effort to get him into the programs and to see whether or not some jurors can be influenced by some of the programs on which this man has worked.

This is an appeal to prejudice and passion and I think that counsel said before the case resumed on the defense's case that he would adhere to the issues involved in this case.

[616] And this could not be farther from the issues in this case.

Mr. STAVIS. If Your Honor please, the background of this witness is an essential part of this case before the jury could possibly appraise his willfulness.

The COURT. What you have here——

Mr. STAVIS. This document was particularly a document that was written by the defendant.

The COURT. You have already been permitted to go into some detail into this witness' background but this is something else.

Mr. STAVIS. There was a statement that was introduced into evidence by Senator McClellan and that statement and in the context in which it was introduced in the context of the hearing in which the defendant appeared and that testimony would

make it appear that the defendant is some wild fanatical individual and there have been numerous references to Stokely Carmichael and riots, et cetera.

The background of this defendant, the actual works and writings that he has done shows that he is just a——

Mr. BRESS. Rioting.

Mr. STAVIS. That was uncalled for, Mr. Bress.

The COURT. That was unnecessary, Mr. Bress.

Mr. BRESS. I will withdraw that. I said that facetiously.

Mr. STAVIS. It shows that he is so far removed from [617] that image created by Senator McClellan that I think the jury is entitled to see it and this document shows the kinds of things that this witness has done and what he stands for.

The COURT. Your proffer has been made for the record.

The objection is sustained.

Mr. BRESS. May we have it understood that this kind of an appeal for passion and prejudice will not continue?

The COURT. It has no place in a case like this.

I want to caution you, Mr. Stavis, that when you have an Exhibit marked for identification, show it to counsel before you show them to the witness.

Mr. STAVIS. Excuse me, Your Honor. I simply want to state what my understanding is of the way Exhibits are marked and handled in the Courts of both New York and New Jersey and that is that any time an Exhibit is marked for identification by the Clerk, it is then identified by the witness and it is shown to your adversary when it is offered and not prior.

The COURT. Here you will show them to counsel as you have them marked for identification.

Mr. STAVIS. I understand that.

I wanted you to understand what my practice was before.

The COURT. The practice here is different.

(In open Court:)

Mr. STAVIS. Mr. Bress, will you please come back to the Bench?

[618] The COURT. You may have it marked and then show it to counsel.

Mr. STAVIS. I will do that.

(Whereupon, Defendants' Exhibit No. 3 was marked for identification.)

(Defendants' Exhibit No. 3 was shown to Mr. Bress.)

Mr. BRESS. May we approach the Bench?

The COURT. Yes.

(At the Bench:)

Mr. BRESS. I object. This is the identical thing.

Mr. STAVIS. Now, I had it marked for identification as Defendants' No. 3.

The COURT. For the record this is a special report on the United Planning Organization.

Mr. STAVIS. A large part of it was written by Mr. McSurely.

The COURT. There is nothing in here that indicates that it was written by Mr. McSurely.

Mr. STAVIS. He would testify about that.

The COURT. Your proffer has been made for the record.

The objection is sustained.

Mr. BRESS. Is there anything like this that you have left?

Mr. STAVIS. Excuse me, Mr. Bress.

The COURT. Go ahead.

Mr. STAVIS. I very carefully called you to the Bench [619] so that we would not——

Mr. BRESS. I appreciate that.

I thought we might expedite this.

Mr. STAVIS. I will present my case in the normal course.

The COURT. You may do so.

(In open Court:)

By Mr. STAVIS:

Q. When did you meet Margaret McSurely?

A. I met her in 1966.

She was working at the United Planning Organization, the same place I was working.

Q. And you married when?

A. We were married the first of 1967.

Q. And the two of you moved to Kentucky when?

A. We moved there on April 1st of 1967, April Fool's Day.

Q. And at that time you had a job there?

A. Yes, sir. I had been hired as Director of the training program for the Appalachian Volunteers.

This was just another poverty group that was working in the coal fields of eastern Kentucky and West Virginia and the western part of Virginia.

Q. And how long did you live in Kentucky?

A. Oh, we lived in the State of Kentucky from April Fool's [620] Day until about July of '69 of last year when I—when we moved up and I took another job teaching school.

We lived in the mountainous part of eastern Kentucky.

You see Kentucky is divided up——

Mr. BRESS. The answer is not responsive.

The WITNESS. It is divided up into the mountains and the blue ground state.

The COURT. You have answered the question.

By Mr. STAVIS:

Q. When did you leave the mountainous part of Kentucky?

A. We left very abruptly on—at 2:00 o'clock in the morning on December 13, 1968 when our house was dynamited and nearly killing my wife and my baby and myself and we moved all of our stuff out and moved to Lexington, Kentucky.

Q. And then you moved up to this area and started teaching here?

A. That is correct.

I had a job in Lexington for a short period of time and then we moved up here.

Q. Now, I want to refer you to the date of November 8, 1968 and that was an occasion that you heard Mr. Brick testify about.

You met him in Pikeville that day?

A. Yes, he was there.

It was actually the Post Office, the U.S. Post Office [621] and they have the offices in there of the Federal Marshal, the man that was on yesterday, Joe Mullins, and he was there for two purposes.

Q. Hold up.

Mr. BRESS. I object.

The COURT. The objection is sustained.

By Mr. STAVIS:

Q. You met him there that day?

A. That is correct, right.

Q. Now, was that a day on which there was returned to you certain documents that had been seized on August 11, 1967?

A. Yes, we had——

Q. Yes or no?

A. Yes.

Q. Now, I think you heard some testimony about these documents being in a jail cell?

A. Yes.

Q. And was that the day you received all those documents back?

A. Yes.

Q. And did you spend any time with Mr. Brick that day?

A. Yes. We spent about an hour and a half together, I would say, going over this long list that he had.

Q. Did he have a list?

A. Yes, he had—he brought that over to me.

[622] Q. I show you a document which has previously been marked as Defendants' Exhibit 8 for identification and ask if you will tell me whether that is the list that you spent about an hour and a half with Mr. Brick going over?

A. Yes, this is it.

Mr. BRESS. May I see it, Mr. Stavis?

Mr. STAVIS. Yes.

It was previously marked.

Mr. BRESS. Thank you.

May we approach the Bench?

The COURT. Yes, certainly.

(At the Bench:)

Mr. BRESS. This document purports to be a receipt signed by Thadeus Scott described as, I think, Deputy Sheriff or Deputy Marshal of some kind in Kentucky.

This is the receipt given to Mr. Brick of the Senate Committee for the items previously received by Mr. Brick and now fully returned to the custody of those who were charged with custody of them under the order of the Court as previously shown by the evidence or by the arguments.

I submit, Your Honor, that we have had a ruling about the legal effect of the State's seizure, about the effect of the Government's inspection of the documents after they were seized.

It is clear that the Government took the documents [623] shown or were given the documents shown and they were returned and so the Committee had nothing.

This is the receipt for the return of those documents and it has nothing at all to do with the issues in this case as to whether or not the defendants were served with a subpoena to produce documents and didn't comply.

The COURT. What is the purpose?

Mr. STAVIS. Mr. Bress did not limit himself to the proofs that he just stated, but over our objection, introduced evidence and a purported conversation between Mr. McSurely and Mr. Brick

Mr. STAVIS. What was that last question?

(Whereupon, the last question was read.)

Mr. STAVIS. I would like to offer this in evidence at this time.

The COURT. It will be received.

(Whereupon, Defendants' Exhibit No. 4 was marked for identification, and received into evidence.)

By Mr. STAVIS.

Q. Now, that document purports to be a receipt signed by Thadeus Scott, does it not?

A. Yes.

Q. Whose signature appears on the bottom of each page?

A. I guess that is Thadeus Scott's initials.

Q. And he signed the back page?

A. Yes.

Q. Was this—were these the documents that Mr. Brick had taken from among the documents that had been seized from you and Margaret on August 11, 1967?

Mr. BRESS. I object.

The WITNESS. These were the ones that he said he took. I guess this is the complete list. There was no way of telling.

By Mr. STAVIS:

[626] Q. You would have no way of knowing?

A. No.

Q. And you were going over this with Mr. Brick and what was going—what was being said between you as you were going over this?

A. Mr. Brick had a silly little grin on his face as we talked.

He talked about his authorship of children's books and my writings that he had been looking at and as he handed me personal love letters of my wife that he had taken up to the Senate and viewed and he would giggle and say, now here's a letter from Drew Pearson to Margaret which says, Dearest Cucumber and he would say, mark that off, and then he would hand me another one and he would say here's another one.

What do you think of this one?

He would giggle and it made me very sick to think that a U.S. Government official had come down to Pike County and would steal stuff from the coal operators who had stolen it from us originally and taken it up there, 260-some letters and had taken it up there and was passing it around in the Senate. And if this was the attitude that he took towards it, I knew what at-

in which Mr. McSurely was supposed to have made some statements which Mr. Bress had introduced for the purpose of showing the intent of Mr. McSurely and which conversation was something to the effect that Mr. McSurely had contempt for the Committee.

Now, in so doing, Mr. Bress has opened the door because that conversation occurred at the conclusion of Mr. McSurely's spending an hour and a half with Mr. Brick reviewing, as you will see by all these check marks, reviewing everyone of these items and that Mr. McSurely is prepared to testify that he spent that hour and a half with Mr. Brick and they were reviewing and looking at every one of these items, and that Mr. McSurely indeed did express contempt for Mr. Brick and for those people who had taken his wife's personal and intimate papers, as you will see in those documents.

[624] Now, since Mr. Bress has introduced testimony about the conversation which was the conclusion of an hour and a half review of these documents, Mr. McSurely is entitled to testify as to what the circumstances were and what he did in fact say.

Mr. BRESS. If the Court please, you will recall that I limited it only to the service and that it was contempt and so forth.

The COURT. I am inclined to agree with the Government's position, but in an effort to allow you some latitude, I am going to permit this Exhibit to be mentioned, but you are not going to go through everyone of these.

Mr. STAVIS. No.

Mr. BRESS. Well, I think, Your Honor——

The COURT. I agree with you.

Mr. BRESS. If he goes—may I—I would like to have the Court reconsider.

There was a conversation at the time of service. I only offered that conversation and the fact that Mr. Brick had told Mr. McSurely that the refusal to comply would constitute contempt of Congress and he said that is something he had plenty of.

Now they could have talked about religion and they could have talked about politics and the rest of it wasn't relevant nor is this.

The COURT. I understand your position, but I am [625] going to permit them to use this.

(In open Court:)

titude Senator McClellan and some of the older men who happened to work on that Committee had towards these letters, and it was very clear to me what had been going on and I had just suspected it up to then, but this made it very [627] clear as to the attitude he had towards it and I was really getting mad.

Q. What did you say to him?

A. Well, when he finished handing all that stuff back with his little grin, and I had to sign all of it and Margaret was so embarrassed that she went away and I took care of doing that.

Then I walked out and then he said to me, now, we are going to get these documents back. If you don't give them to us, we are going to—you are going to be in contempt of Senator McClellan and his Committee.

I said I am full of contempt for Senator McClellan and his Committee and you and I hate your guts.

Q. Now, Mr. McSurely—at this time, Your Honor, in following the practice of my worthy adversary, I would like to read to the jury Defendants Exhibit 4 in evidence.

The COURT. It is in evidence. You may pass it to the jury.

Mr. STAVIS. I am sorry?

The COURT. If it is a lengthy document, why don't you pass it to the jury.

Mr. STAVIS. I will read it quickly.

I don't think I will take as much time to read this document as Mr. Bress did.

The COURT. All right.

[628] Mr. STAVIS. It reads as follows:

"Receipt is hereby acknowledged of the documents described below, which were received by John Brick, investigator on the staff of the Senate Permanent Subcommittee on Investigations, from Thaddeus Scott, detective on the staff of the Commonwealth's Attorney for Pike County, Kentucky. The documents described below comprise all documents which have been in the possession of the Subcommittee, and no copies of any documents have been retained by the Subcommittee.

"1. Letter dated March 14, 1967, to Henry Binford from Margaret McSurely.

"2. Undated letter to the Superintendent of Pike County Schools from Ester Mae Heifetz.

"3. Undated and unsigned letter, addressed to 'Dear Mother.'

"4. Letter dated October 23, year not specified, addressed 'Dear Millie,' from 'Margaret.'

"5. Undated and unsigned letter to, 'Dear Sandy.'

"6. Unsigned and undated series of entries on 3" by 5" cards.

"7. Typed background resume, dated May 18, 1966, of Margaret H. Laughrun.

"8. Unsigned letter dated May 23, 1967, to 'Dear Mother.' [629] "9. Letter dated February 9, 1964, to 'Dear Margaret,' signed 'Jack.'

"10. Typed notes apparently designed as an outline for a proposed book.

"11. Letter dated October 22, 1964, addressed, 'Dearest M,' from 'Jack.'

"12. Envelope from, 'p.o. box 564, Atlanta, Georgia,' addressed to Margaret Laughrun in Jackson, Mississippi, bearing postmark dated October 23, 1964.

"13. Letter dated October 13, 1964, addressed to, 'Dearest M,' from 'Jack.'

"14. Envelope from the Student Non-Violent Coordinating Committee in Atlanta, Georgia, addressed to Margaret Laughrun in Batesville, Mississippi, dated September 13, 1964.

"15. Unsigned and undated series of notes relating to a visit to a motel.

"16. Letter dated July 29, 1967, addressed to 'Dear Charles,' and signed, 'Al.'

"17. Letter dated March 12, 1967, to Jim Aronson, from Al McSurely.

"18. Letter dated July 19, 1967, addressed to Bob Garbo, unsigned.

"19. Typewritten documents entitled, 'Notes on [630] Richmond, Kentucky.'

"20. Letter dated May 23, 1967, addressed to 'Dear Jim, and others there in Bloomington,' signed, 'Al McSurely.'

"21. Letter dated May 23, 1967, addressed to 'Dear Jim,' and signed, 'Al.'

"22. Letter dated April 16, year unspecified, addressed to 'Dear Justin', from Margaret McSurely.

"23. Letter dated June 25, 1967, addressed to David Walls from Margaret McSurely.

"24. Letter dated February 5, 1967, on the letterhead of Institute for Policy Studies, Washington, D.C., addressed to, 'Al and Margaret,' and signed, 'Sue.'

"25. Letter dated March 30, 1967, on the letterhead of Board of National Missions of the United Presbyterian Church in the U.S.A., addressed to Alan McSurely from Philip H. Young.

"26. Typewritten notes, apparently page three of a prospectus for a newspaper.

"27. Typewritten page headed, 'Discussion Draft,' and entitled, 'Cool it, Baby.'

"28. Letter dated June 4, 1967, addressed to 'Dear Margaret and Al' and signed, 'Esther.'

[631] "29. Letter dated June 8, 1967, addressed to Senator John Sherman Cooper from Margaret Lauren McSurely.

"30. Letter dated Saturday, April 1, 1967, on the letterhead of Southern Conference Educational Fund addressed to 'Dear Al,' from Anne Braden, with an attachment listing various officials of the Southern Conference Educational Fund.

"31. Letter dated November 14, year unspecified, addressed, 'Dear John,' and signed, 'Margaret.'

"32. Typewritten document of 12 pages, headed Southern Conference Educational Fund (SCEF) entitled, 'A Budget and Outline of Work for 1967.'

"33. Unsigned letter dated April 20, 1967, addressed to 'Dear Esther.'

"34. Letter dated January 25, 1967, addressed to 'Dear Wayne and Gail and Alan and Jan,' from 'Margaret L.'

"35. Unsigned letter dated February 12, 1967, addressed to, 'Dear Sue.'

"36. Unsigned letter dated July 12, 1967, addressed to 'Dear Anne and Carl.'

"37. Letter on the letterhead of Southern Conference [632] Educational Fund dated July 21, 1967, addressed to, 'Dear Al & Margaret,' signed 'Anne.'

"38. Letter dated July 16, 1967, addressed to Sandy Rosenblum and signed, 'Margaret and Al.'

"39. Letter dated July 23, 1967, addressed to, 'Dear Don and Carol,' signed, 'Al'.

"40. Typewritten document headed, 'Rough Agenda of First SCEF Training Session.'

"41. Letter dated April 4, 1967, addressed to Al McSurely, signed, 'Topper.'

"42. Typewritten document headed, 'Staff of Southern Conference Educational Fund as of 11/21/66.'

"43. Unsigned letter dated February 10, year unspecified, addressed, 'Dear Wayne and Gail.'

"44. Letter dated May 29, 1967, addresed, 'Dear Al,' signed 'Howie.'

"45. Two page outline of a document entitled 'Radical Challenge to the Decidees of America,' by Alan McSurely.

"46. Nine page document entitled, 'Ideas for Book.'

"47. Unsigned letter dated July 19, 1967, addressed, 'Dear Molly.'

[633] "48. Unsigned letter dated April 10, 1967, addressed, 'Dear Anne and Carl.'

"49. Letter dated August 2, 1967, addressed, 'Dear Mike,' signed, 'Al.'

"50. Unsigned letter dated May 10, 1967 addressed, 'Dear Bob and Dottie.'

"51. Unsigned letter dated Tuesday, May 2, year unspecified, addressed to, 'Dear Mary.'

"52. Letter dated May 24, 1967, addressed to, 'Dear Sue,' from 'Margaret L. McS.'

"53. Unsigned letter dated August 11, year unspecified, addressed to 'Dear Folks.'

"54. Letter dated July 25, 1967, on the letterhead of the "National Conference for New Politics,' addressed to Alan McSurely from William F. Pepper.

"55. Letter dated July 13, 1967, addressed to, 'Dear Anne and Carl," signed 'Al,' with attachments consisting of a letter dated June 9, 1967 addressed, 'Dear Bill Pepper',' signed by, 'Al McSurely'; letter dated July 5, 1967, on the letterhead of 'The National Conference for New Politics,' addressed to Al McSurely, signed 'Bill Pepper'; a two-page memorandum headed, 'National Conference for [634] New Politics,' signed by Bill Pepper; one-page memorandum headed, 'National Conference for New Politics,' signed by Bill Pepper.

"56. Unsigned letter dated June 9, 1967, addressed, 'Dear Sharlene.'

"57. Typewritten document headed, 'SCEF Financial Picture for First Six Months of 1967.'

"58. Letter dated May 22, 1967, addressed, 'Dear Gary and Gaunnie,' signed, 'Al.'

"59. Letter dated July 24, 1967, addressed, 'Dear J.R.' signed by Anne Braden.

"60. Letter dated April 27, 1967, addressed 'Dear Carl and Ann,' signed, 'Al.'

"61. Unsigned letter dated July 11, 1967, addressed, 'Dear Hamis.'

"62. Undated letter addressed 'Dear Jack,' signed 'Al.'

"63. Two-page outline entitled, 'Ideas for Analysis and Program.'

"64. Typewritten document entitled, 'Rough Agenda of First SCEF Training Session.'

"65. Unsigned letter dated June 9, 1967, addressed 'Dear Esther.'

"66. Unsigned letter dated July 13, 1967, addressed to Harvey Richards.

[635] "67. Unsigned letter dated July 28, 1967, addressed 'Dear John and Kathy.'

"68. Letter dated May 21, 1967, addressed, 'Dear Paul,' signed 'Al McSurely.'

"69. Unsigned letter (incomplete) dated July 29, 1967, addressed 'Dear Julian.'

"70. Unsigned letter dated June 22, 1967, addressed 'Dear Bob and John and Sue.'

"71. Handwritten letter dated June 7, 1966, addressed to Alan McSurely, signed 'Mike.'

"72. Letter dated March 24, 1967, addressed to Mrs. Edith Easterland, from Alan McSurely.

"73. Letter dated January 16, 1967, addressed, 'Dear Carl and Anne,' from Margaret Lauren.

"74. Letter dated March 18, 1965, addressed, 'Dear Margaret,' signed with initials 'M.C.'

"75. Letter dated July 28, 1967, addressed 'Dear Bill and Chris,' signed, 'Al.'

"76. Document of 23 pages entitled, 'Across the U.S. in Early 1967.'

"77. Letter dated July 28, 1967, addressed, 'Dear Al,' signed by Joseph Molloy.

"78. Undated letter addressed to 'Superintendent, Pike County Schools' from Esther Mae Heifetz.

"79. Unsigned letter dated May 30, 1967, addressed [636] to, 'Dear Carl, Ann and Nessa or other Printer.'

"80. Letter dated October 23, year unspecified, addressed to 'Dear Millie' from 'Margaret.'

"81. Unsigned letter dated June 26, 1967, addressed 'Dear Frank.'

"82. Unsigned letter dated July 28, 1967, addressed to Box R 570 .

"83. Unsigned letter dated May 31, 1967, addressed 'Dear Gene.'

"84. Document dated November 23, 1966, on printed form of United Planning Organization.

"85. Single page document entitled 'Prologue.'

"86. Letter dated April 28, 1967, on letterhead of Southern Conference Educational Fund, addressed to Dr. John A. Scott and signed, 'Carl.'

"87. Single page document dated July 11, 1967, entitled, 'McSurely's Car Expense from June 8 through July 11, 1967.'

"88. Single page document entitled 'Outline for Facts about the War in Vietnam for Would-Be Soldiers in Appalachia.'

"89. Single page document entitled 'Organizations Which Have Received First Draft of Vocations [637] for Social Change.'

"90. Undated and unsigned letter on the letterhead of the Jefferson Davis Hotel, addressed, 'Dear Folks.'

"91. Letter dated June 1, 1967, addressed, 'Dear Al & Margaret,' signed, 'Bill.'

"92. Letter dated July 26, 1967, addressed, 'Dear Al and Mgt.' signed 'Jack.'

"93. Unsigned letter dated May 10, addressed 'Dear David.'

"94. Letter dated June 19, 1967, addressed, 'Dear Al,' from Toby Brooks and George Brosi.

"95. Two-page typed document, unsigned, dated January 1, 1967.

"96. Birth certificate of Alan McSurely.

"97. Undated and unsigned page of handwritten notes.

"98. Unsigned letter dated June 22, 1967, addressed 'Dear Mike.'

"99. Letter dated May 23, 1967, addressed, 'Dear John,' from 'Al and Margaret McSurely.'

"100. Single page outline of an article.

"101 U.S. Civil Service Commission document Form 227.

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"102. Four-page Federal employment form, 'Statement [638] of Personal History' for Alan McSurely.

"103. Letter dated February 10, 1967, addressed, 'Dear ACCESSers,' signed by Alan McSurely.

"104. Pages 4, 7, 8 and 9 of an untitled composition of which page 4 begins, 'Southern political puppets . . .'

"105. Letter dated June 29, 1967, addressed, 'Dear Howie,' signed 'Al.'

"106. Letter dated May 23, 1967, addressed, 'Dear Jim,' signed 'Al and Margaret.'

"107. Letter dated June 14, 1967, on the letterhead of 'Leslie Knott, Letcher, Perry Community Action Council,' addressed to 'Al McSurely,' signed by James E. Young.

"108. Two-page document headed 'Day #2.'

"109. Two-page document entitled 'Two sides of Socialism.'

"110. Four-page document entitled, 'A White Paper on the South—1967.'

"111. An unsigned letter dated May 23, 1967, addressed, 'Dear Esther (and Joel if he's around).'

"112. Single page document entitled 'People Who Have Been Asked to Write Essays for Vocation for Social Change.'

[639] "113. Letter dated July 13, 1967, addressed, 'Dear Bill,' from 'The Mountain Energizer, Al.'

"114. Letter dated July 19, 1967, addressed, 'Dear Mary,' signed 'Al.'

"115. Unsigned letter dated Thursday, 22 June, year not specified, addressed 'Dear Jack.'

"116. Two-page document, undated and unsigned, headed, 'News from the Mountains.'

"117. Single page handwritten document consisting of an outline.

"118. Single page document entitled, 'To the Appalachian Volunteers, Incorporated.'

"119. Single page unsigned document dated 12 January 1967, relating to a statement about DD Form 98.

"120. Letter dated May 23, 1967, addressed, 'Dear Fred,' signed 'Al.'

"121. Birth certificate of Margaret Herring.

"122. Handwritten document consisting of a graph entitled, 'Similarities of Appalachia and Vietnam.'

"123. Hand-drawn map of that part of Asia formerly known as Indo-China.

"124. Handwritten document headed 'Training Program for PCU.'

[640] "125. Letter dated May 23, 1967, addressed to Kunstler, Kunstler and Kinoy, signed 'Al.'

"126. Unsigned letter dated June 2, 1967, addressed 'Dear Dinky.'

"127. Unsigned letter dated May 23, 1967, addressed, 'Dear Decca and Bob.'

"128. Letter dated May 23, 1967, addressed 'Dear Clint' signed 'Al.'

"129. Unsigned letter dated May 9, 1967, addressed to Dr. Robert Coles.

"130. Unsigned, undated report on Edith Easterling, addressed to Bill Wells.

"131. Two-page mailing list headed 'Conference on Radical Vocations in the White Community.'

"132. Two-page brochure on 'The Marrowbone Folk School.'

"133. One-page brochure cover entitled, 'The Marrowbone Folk School.'

"134. Three-page document, dated April 17, 1967, entitled, 'Site Proposal for Appalachian Field Study Center.'

"135. Unsigned letter dated April 10, 1967, addressed to Harry W. Caudill.

"136. Letter dated June 4, 1967, addressed 'Dear Margaret and Al,' signed 'Esther.'

[641] "137. Undated single page resume of background of Margaret Herring Laughrun.

"138. Unsigned letter dated August 4, 1967, addressed, 'Dear Margaret.'

"139. Unsigned letter dated September 10, 1965, addressed 'Dear Bill Cremer.'

"140. Western Union press message dated October 9, 1964, addressed 'Dear Young Lady,' signed 'P.'

"141. Unsigned letter dated May 23, 1967, addressed, 'Dear Jeanne Wallace.'

"142. Letter dated April 15, 1967, addressed, 'Dear Mr. McSurely,' signed by Jeanne Wallace.

"143. Letter dated June 16, 1967, on the letterhead of International Publishers, addressed to 'Al McCorley,' signed by James S. Allen.

"144. Letter dated March 28, 1967, on the letterhead of 'Monthly Review,' addressed to Mrs. Margaret Lauren, signed by Edward Borstein.

"145. Unsigned letter dated March 24, year unspecified, addressed, 'Dear Anne.'

"146. Withholding tax statement 1961 for Margaret H. Laughrun.

"147. Three-page document entitled, 'A proposal for [642] a Library of Basic Theoretical Books and Journals for Organizers of the Radical Mountain Movement.'

"148. Letter dated August 2, 1967, addressed, 'Dear Mike,' signed 'Al.'"

The COURT. Will counsel come to the Bench?

(At the Bench:)

The COURT. I want to admonish you that if you are making a statement to the jury, you will stand. Do not sit on counsel table.

Mr. STAVIS. I am sorry.

The COURT. Very well.

(In open Court;)

Mr. STAVIS. I will continue reading.

"149. Letter dated July 13, 1967, on the letter head of the Southern Conference Educational Fund, addressed, 'Dear Al & Margaret' signed by Anne Braden.

"150. Minutes of meeting dated January 11, 1964, held in Washington, D.C., at Mrs. Hamer's.

"151. Two-page resume of background of Margaret H. Laughrun dated May 18, 1966.

"152. Two-page outline of a proposed book.

"153. Five-page brochure by the National Conference for New Politics entitled, 'Don't Mourn for [643] Us . . . Organize.'

"154. By-laws of the Appalachian Volunteers.

"155. Volume 1, #2, (mimeographed) of 'Changes.'

"156. Xerox copy of Volume 1, #2 of a pamphlet entitled, 'Changes.'

"157. Two-page address list of persons in the United States.

"158. Document of 27 pages consisting of names, addresses and telephone numbers of various persons in the United States.

"159. Unsigned letter dated March 27, 1967, addressed, 'Dear Joe.'

"160. Unsigned letter dated April 10, year unspecified, addressed 'Dear Anne and Carl.'

"161. Hand-drawn map of that area of S.E. Asia formerly known as Indo-China.

"162. Handwritten graph entitled 'Similarities of Appalachia and Vietnam.'

"163. A 20-page article entitled 'The Care and Feeding of Power Structures Revisited.'

"164. Two-page brochure published by the Committee for Independent Political Action.

"165. Letter dated October 3, year unspecified, addressed 'Dear Drew', signed 'Margaret.'

"166. Single page outline, headed, 'Assumptions.'

[644] "167. Letter dated April 13, year unspecified, addressed, 'Dear Anne and Carl,' signed, 'Margaret.'

"168. Letter dated May 22, 1967, addressed, 'Dear Bill and Chris,' signed 'Al.'

"169. Two-page document dated January 1, 1967.

"170. Two-page document entitled, 'Outline of the Basic Southern Mountain History Book.'

"171. Letter dated May 23, 1967, addressed, 'Dear Bob and Decca,' signed 'Al.'

"172. Letter dated March 24, 1967, addressed, 'Dear ACCESSers,' signed Alan McSurely.

"173. Single page document beginning 'Siphoning the fear out of the world . . .'

"174. Single page document entitled, 'Is this Fair?'

"175. Letter dated May 23, 1967, addressed, 'Dear Sirs,' from Alan McSurely.

"176. Letter dated July 5, 1967, on the letterhead of the National Conference for New Politics addressed to Alan McSurely from William F. Pepper.

"177. Unsigned letter dated April 20, 1967, addressed, 'Dear Esther.'

"178. Letter dated May 23, 1967, addressed 'Dear Pat and David,' signed 'Al.'

"179. Letter dated May 23, 1967, addressed, 'Dear [645] Fred,' signed 'Al.'

"180. Letter dated May 21, 1967, addressed, 'Dear Betty' from 'Margaret.'

"181. Unsigned letter dated June 26, 1967, addressed to 'Dear Frank.'

"182. Letter dated January 15, 1967, addressed, 'Dear Charles and Pam,' signed 'Al.'

"183. Unsigned document dated April 16, 1967, entitled, "The Side I am on, Boys!'

"184. Letter, date illegible, addressed, 'Dear Al.' signed, 'Gary.'

"185. Single page document, apparently the agenda of a four-day conference in Washington, D.C.

"186. Four-page document entitled 'A SCEF Program for the Mountain . . .' with part of that title obliterated.

"187. Memorandum dated May 17, 1967, from Morton Thomas to SCEF.

"188. Letter dated March 27, 1967, addressed, 'Dear Milt,' signed 'Al.'

"189. Five-page memorandum to Appalachian Volunteer Staff members from Al McSurely.

"190. Three-page rough draft of an Appalachian Volunteer training session.

"191. Two-page brochure of 'The Organizers Library [646] Series of the Southern Conference Educational Fund.'

"192. Two-page work record of Alan McSurely April 16–April 28, year unspecified.

"193. Letter dated March 27, 1968, addressed, 'Dear Gary,' signed 'Al.'

"194. Letter dated June 29, 1967, addressed, 'Dear Charlie,' signed, 'Al.'

"195. One page outline of Southern Mountain Project Staff Meeting, June 3, 1967.

"196. One page document entitled 'Ideas for Book.'

"197. Seven-page article entitled, 'The Dog and the Tick.'

"198. Certificate of Marriage, July 17, 1967, for Alan McSurely and Margaret H. Laughrun.

"199. Identification certificate for Margaret Herring Laughrun issued by the Council of Federated Organizations, Jackson, Miss.

"200. Letter dated March 14, 1967, addressed to Henry Binford, from Margaret Lauren McSurely.

"201. Letter dated October 6, 1964, on flight letterhead of North Central Airlines, addressed, 'Dearest Cucumber,' and signed, 'Drew.'

[647] "202. Single page document entitled, 'To the Appalachian Volunteers, Inc., by Al McSurely.

"203. Letter dated April 16, year unspecified, addressed, 'Dear Mort,' from Margaret.

"204. Six-page handwritten outline, title illegible.

"205. Single page outline entitled, 'The Southern Mountain Program.'

"206. Letter dated April 16, year unspecified, addressed, 'Dear Mort,' from 'Margaret.'

"207. Unsigned letter dated June 22, 1967, addressed, 'Dear Bob, John and Sue.'

"208. Unsigned letter dated June 9, 1967, addressed, 'Dear Sharlene.'

"209. Letter dated March 27, 1967, addressed to 'Dear Joe," signed, 'Al.'

"210. Unsigned letter dated May 23, 1967, addressed, 'Dear Esther,' (and Joel if he's around.)'

"211. Unsigned and undated letter, addressed to 'Dear Anne and Carl.'

"212. Letter dated August 11, year unspecified, addressed to 'Dear Folks' from 'Margaret & Al.'

"213. Letter dated May 23, 1967, addressed to 'Dear John,' from 'Al and Margaret McSurely.'

"214. Single page document relating to Kangaroo.

[648] "215. Letter dated July 28, 1967, addressed to 'Dear Bill and Chris,' signed 'Al.'

"216. Two copies of a three page document entitled, 'Tentative Schedule of the April 24–26 Training Session at the Breaks.'

"217. Single page document giving addresses of Drew Pearson's office staff.

"218. Letter dated July 24, 1967, addressed 'Dear J.R.,' signed by Anne Braden.

"219. Five-page memorandum to Appalachian Volunteer Staff from Al McSurely.

"220. Single-page document relating to famed politcal symbols.

"221. A single-page document entitled 'Step 3.'

"222. A single-page document entitled 'Sample Minutes of the First Meeting.'

"223. Unsigned letter dated May 23, 1967, addressed 'Dear Mother.'

"224. Unsigned and undated letter addressed 'Dear Mother.'

"225. Two page outline entitled 'Ideas for Analysis and Program.'

"226. Two copies of a single-page outline entitled 'Rough Agenda of First SCEF Training Session.'

"227. Undated letter addressed, 'Dear Jack,' signed 'Al.'

[649] "228. Unsigned letter dated July 29, 1967, addressed 'Dear Julian.'

"229. Letter dated July 13, 1967, addressed 'Dear Bill' and signed 'The Mountain Energizer, Al.'

"230. Mimeographed sheet consisting of (1) list of persons now on the SNGG payroll and (2) list of persons removed from the SNGG payroll.

"231. A mimeographed sheet containing a list of persons whose names have been removed from the SNGG payroll and a list of persons added to the SNGG staff.

"232. A carbon copy of an unsigned letter dated June 22, 1967, addressed 'Dear Bob, John and Sue.'

"233. A mimeographed pamphlet entitled 'A New Political Union.'

"234. A mimeographed copy of a document entitled 'Maximum Feasible Participation.' by Alan McSurely."

By Mr. STAVIS:

Q. Now, and the conversation between you and Mr. Brick about which you testified, occurred at the conclusion of your going through this with him?

The COURT. Try not to lead, Mr. Stavis.

Ask your question and let him answer.

[650] By Mr. STAVIS:

Q. Did the conversation between you and Mr. Brick occur at the conclusion of your going through that list?

Mr. BRESS. I object. Leading.

The COURT. The objection is sustained.

By Mr. STAVIS:

Q. At what time did the conversation between you and Mr. Brick occur on November 8, 1968?

A. We were conversing the whole time that he was handing these documents to me, and I was supposed to be checking them off.

As I said, he was—he had this real silly grin on his face and he handed them to me——

The COURT. You testified to that, Mr. McSurely.

The question is what time?

The WITNESS. It was during the time that he was handing this—these back to me.

By Mr. STAVIS:

Q. When he handed these things back to you, did you and he look at the particular items?

A. Yes.

Q. Was some of them typed?

A. Yes.

Q. Were some of them handwritten?

A. Yes.

[651] Q. And did he make any comments about any of the items.

A. Well, he would say, now, here is a good one and he would hand it to me.

Mr. BRESS. This is repetitious, I object.

The COURT. The objection is sustained.

By Mr. STAVIS:

Q. Did you know the lady who became your wife in 1964?

A. No, I first met Margaret in 1966 at the UPO.

Q. Had you in Kentucky heard that the contents of some of those personal letters of your wife had been the subject of gossip and discussion?

Mr. BRESS. I object.

The COURT. The objection is sustained.

The WITNESS. It was common knowledge.

The COURT. The objection has been sustained.

By Mr. STAVIS:

Q. And, Mr. McSurely, did Mr. Brick tell you that——

Mr. BRESS. Objection, irrelevant.

The COURT. The objection is sustained.

By Mr. STAVIS:

Q. Did Mr. Brick identify the documents that he wanted you to bring back in response to the subpoena with which you had been served that day?

Mr. BRESS. Objection, irrelevant.

The COURT. You may answer the question.

[652] The WITNESS. Mr. Brick——

The COURT. That can be answered yes or no, Mr. McSurely.

By Mr. STAVIS:

Q. Did he identify them?

A. He identified them in general.

He said this was in general what the McClellan Committee wanted.

Of course, they had already had it for a year and a half.

The COURT. This might be an appropriate time for the luncheon recess.

You may step down.

We will recess for luncheon at this time.

Please return to the courtroom at two o'clock.

Do not discuss this case amongst yourselves or with anyone on the outside and keep an open mind until you have heard all the evidence, the arguments of counsel and the instructions of the Court and do not read anything in the newspapers or listen to anything on the radio or television in connection with this trial.

You may return at two o'clock.

(Whereupon, at 12:55 p.m., Court adjourned to reconvene at 2:00 o'clock p.m., the same day.)

[653] AFTERNOON SESSION

(Defendants present in the courtroom.)

The COURT. Are we ready to bring the jury back?

Mr. STAVIS. Yes.

(Whereupon, the jury entered the courtroom.)

Whereupon ALAN McSURELY resumed the witness stand and having been previously duly sworn, was examined and testified further as follows:

FURTHER DIRECT EXAMINATION

Mr. STAVIS. Would you read the last question and answer to the jury?

(Whereupon, the last question and answer was read to the jury.)

By Mr. STAVIS:

Q. Did he identify it?

A. He identified it in general.

He said this is in general what the McClellan Committee wanted and of course they already had it for a year and a half.

Q. Now, had you, Mr. McSurely, ever consented to the McClellan Committee or Mr. Brick's possession of these documents which were returned to you on November 8, 1968, and which were listed in Defendants' Exhibit 4?

A. Of course not.

[654] Q. In fact, you had gone to Court to get them back.

The COURT. Objection sustained.

Let's not lead the witness.

By Mr. STAVIS:

Q. Did you take any legal action to get them back?

Mr. BRESS. I object.

The COURT. The objection is sustained.

By Mr. STAVIS:

Q. Did you receive these documents back as a result of any Court order?

Mr. BRESS. I object.

The COURT. The objection is sustained.

The WITNESS. Yes.

The COURT. That last answer will be stricken, members of the jury.

By Mr. STAVIS:

Q. Now, some of the items which were listed and which were read to you, they were personal and intimate letters of your wife or to your wife?

Mr. BRESS. I object.

The COURT. The objection is sustained.

By Mr. STAVIS:

Q. Now, did you——

The COURT. You know how to phrase your questions, Mr. Stavis.

[655] Mr. STAVIS. Excuse me just a moment, Your Honor.

The COURT. Yes.

By Mr. STAVIS:

Q. I call your attention to item 141,—140, "Western Union Press Message dated October 9, 1964, addressed 'Dear Young Lady,' signed 'P'."

Had you ever seen that before November 8, 1968?

Mr. BRESS. I object.

The WITNESS. No.

By Mr. STAVIS:

Q. I call your attention—

The COURT. Will counsel come to the Bench, please.

(At the Bench:)

The COURT. I have allowed you latitude in letting you introduce this Exhibit.

You assured me you would not go over these individual items.

Now, it has taken a half hour in reading it to the jury and now you are singling out and doing what you assured the Court you were not going to do.

Mr. STAVIS. I am not going contrary to that.

The COURT. What do you propose to do?

Mr. STAVIS. I want to call his attention to two or three items and ask whether he had ever seen those items prior to that.

[656] Mr. BRESS. Irrelevant.

The COURT. If it is two or three you may proceed.

(In open Court:)

By Mr. STAVIS:

Q. I call your attention to Item No. 11, a letter dated—Item No. 11, "Letter dated October 22, 1964, addressed, 'Dearest M', from 'Jack.'"

Had you ever seen that prior to November 8, 1968?

A. No.

Q. I call your attention to Item 13, a "Letter dated October 13, 1964, addressed to, 'Dearest M,' from 'Jack.'"

Had you ever seen that item before November 8, 1968?

A. No.

Q. I call your attention to Item 74, "Letter dated March 18, 1965, addressed 'Dear Margaret' signed with initials 'M.C.'"

Had you ever seen that before November 8, 1968?

A. No.

The COURT. Will counsel come to the Bench?

(At the Bench:)

Mr. STAVIS. That is it.

The COURT. All right.

• • • • • •

[696] • • • MARGARET MCSURELY was called as a witness by the Defendants and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. STAVIS:

[697] Q. Now, Mrs. McSurely, what is your full name?

A. Margaret Herring McSurely.

Q. Can you talk a little louder, Mrs. McSurely and talk into the microphone.

A. Okay. Margaret Herring McSurely.

Q. And Herring was your maiden name?

A. Right.

Q. And where and when were you born?

A. I was born in Ashland, Kentucky, in 1936.

Q. And where were you brought up?

A. I was raised in Winston-Salem, North Carolina.

Q. And where did you go to school?

A. I went to high school and to Wake Forest College for a year and a half.

Q. And what did your father do?

A. He was a Baptist preacher.

Q. Where?

A. Well, Winston-Salem all the time I was growing up and after that, he moved to Jackson, Mississippi and Nashville, Tennessee and now he is living in Charlotte and my mother is living there, too.

Q. Have your father and mother been with you throughout this trial?

A. Yes.

[698] Q. Mrs. McSurely, has Mr. and Mrs. McSurely been here, too?

A. Well, Al's father is dead, but his mother has been here.

Q. Now, when were you first married?

A. Well, I got married the first time in 1955.

Q. Any children born by that marriage?

A. I had two sons.

Q. And where did you first—that marriage ended up in divorce?

A. Yes, we were married about seven years.

Q. Now, when did you first move to Washington?

A. Well, I lived in Washington the first time with my first husband and we moved away and then we moved back here about, I think it was 196— 1960. It was just after Kennedy was elected.

Q. Did you work here in Washington?

A. Yes, I did.

Q. What sort of work did you do?

A. I did secretarial work.

Q. And for whom did you work?

A. I started out working for Senator Stephen Young of Ohio and then I worked for Drew Pearson. I worked for Drew Pearson the newspaperman.

Q. How long did you work for Drew Pearson?

[699] A. Oh, about two years.

Q. And did you know John Brick before you met him?

A. Yes, I did.

Q. In Kentucky?

A. Yes, I did.

Q. How did you know him?

A. He was married to the secretary of a psychiatrist I was going to for therapy.

Q. When was that?

A. About 1963.

Q. And that was Mrs. John Brick and were they then married?

A. Yes.

Q. What is the name of your psychiatrist?

A. Dr. McKenzie.

Q. And during the time that you were a patient of Dr. McKenzie, were you then employed by Mr. Pearson?

A. Yes, I was.

Q. And did you talk to Mrs. Brick about her husband?

A. Yes. All she told me was where he was working.

Q. And did he—did you see the reports typed by Mrs. Brick of your interviews with the doctor?

A. No.

Q. Of your interviews with Dr. McKenzie?

Mr. BRESS. I object to that as leading.

[700] The COURT. Try not to lead.

By Mr. STAVIS:

Q. Did you see a report by Dr. McKenzie—did she discuss with you the matters that you discussed with Dr. McKenzie?

Mr. BRESS. I object.

The COURT. The objection is sustained.

By Mr. STAVIS:

Q. When did you leave Washington?

A. I left Washington after the Democratic Convention of 1964 to go to Mississippi to work with Black people.

Q. Who did you work with specifically?

A. Well, I worked with the Freedom Democratic Party and that was on the challenge to the Congressional, it was—on the challenge to the seating in Congress of a Congressman that had been illegally elected by excluding Black people from voting.

Q. And what year was that?

A. That challenge was in January of 1965.

Q. And did you subsequently move back to Washington?

A. Yes, I moved back in the early winter of 1966. That is January or February.

Q. And what did you do then?

A. I went to work for UPO.

Q. Is that when you met Alan?

A. Yes.

[701] Q. Where you both working then at UPO?

A. Yes.

Q. And in due course you did get married?

A. Yes.

Q. When was that?

A. In the spring of '67.

Q. And after you got married, did you then move to Kentucky?

A. Yes, we moved to Pikeville.

Mr. STAVIS. Your Honor, there has been a great deal of talk about Kentucky and the surrounding country.

We have prepared a map. Perhaps it will be of some assistance in fixing these locations.

It just shows Kentucky, Tennessee, shows Pikeville, and it shows Nashville that Senator McClellan was talking about and it shows Ohio and here is Virginia.

Mr. BRESS. It is irrelevant.

The COURT. Do you have any objection to it?

Mr. BRESS. No real objection, but I think it is——

The COURT. It will be marked as an Exhibit.

Mr. STAVIS. The jury may want to know where the mountainous region is and what it looks like on the map.

Mr. BRESS. Your Honor, may we approach the Bench?

The COURT. Yes.

(At the Bench:)

[702] Mr. BRESS. This Exhibit is not for the purpose of teaching geography to the jury by letting them know what the relationship is.

It is obviously being used for the purpose of doing more.

What is being done is to show the operation of this land in the coal fields and the mineworkers area and that sort of thing, and for that purpose, I think it is not admissible.

The COURT. Well, I'm going to admit the Exhibit but I don't want any more specific reference to it.

Mr. STAVIS. Mr. Bress is trying to keep from the jury Mrs. McSurelys background and the kind of person she is.

Mr. BRESS. I think you have gone into Mrs. McSurely's background far too much.

(In open Court:)

(Whereupon, Defendants' Exhibit No. 5 was marked for identification and received into evidence.)

By Mr. STAVIS:

Q. And do you recall the date when you moved to—to Pikeville?

A. Yes, that was April 1st, 1967.

Q. How long did you live in Kentucky?

A. Oh, in Kentucky we lived until last July.

Q. How long did you live in Pikeville?

A. We lived in Pikeville until our house got dynamited [703] one night and almost killed all of us including the baby.

Q. What date was that?

A. That was at one o'clock in the morning on December 13, 1968.

Q. When was your baby born?

A. December 29, 1967.

Q. Now I refer you to the date of November 8, 1968, and that was the date on which there was some testimony about you having been served with a subpoena.

Is that correct?

A. Right.

Q. Do you remember that date?

A. Yes.

Q. Now, do you remember seeing your husband Alan in conversation with Mr. Brick.

A. Yes, I do. They were——

Q. How long did that conversation last?

A. Oh, I guess it was about a couple of hours.

It seemed like over a long time.

Q. Where were you at the time that they were having this conversation?

A. Well, I was in the jail cell looking over the truckload of stuff and I would walk by and look over Alan's shoulder while —see, Alan and Mr. Brick were going down this list and they had the original of the letter and they had the Xerox copy [704] of a letter that had been Xeroxed and they were checking them off.

Q. You, of course, knew that Mr. Brick had some of your papers, is that correct?

A. Yes.

Q. Now, prior to the time that Mr. Brick showed you the list, did you know exactly which papers he had taken?

A. No, I didn't.

Q. Now, there are a number of items here which go back to 1964 and what I would like to ask you is whether you knew that those items had even been—had been in your possession when the State officials seized your property on August 11, 1967?

Mr. BRESS. I object. Irrelevant.

The COURT. She may answer.

The objection is overruled.

By Mr. STAVIS:

Q. I want you to look specifically at Items——

The COURT. Wait a minute. That question can be answered yes or no.

By Mr. STAVIS:

Q. Did you know whether or not—did you know that some of these personal items had remained in your possession when your papers and files and documents were seized in August, August 11, 1967?

[705] A. Well, I couldn't remember everything I had.

I had a lot, you know. I kept a lot of things, I guess that I should not have kept and they were, you know, stuck back in drawers and you don't expect people to come in and—maybe like you would have a box of stuff in a closet and what not and you just put it back in there and you forget what you all have in it.

I didn't realize that I had all of this stuff.

Q. Now, without necessarily reading what the items are, would you look at the Items No. 140, 165 and 217—140, 165, 201 and 217 and tell me whether you had remembered that those items had been kept by you?

Mr. BRESS. I object. Irrelevant.

The COURT. The objection is overruled. She may answer.
The WITNESS. What was that one again?
The COURT. 140, 165, 201 and 217.
The WITNESS. Yes.
Mr. STAVIS. All right.

By Mr. STAVIS:

Q. Had you remembered that you had had those items on August 11, 1967?
A. No, I didn't think about it.
Q. Had you ever revealed those items to your husband?
A. Oh, no.
[706] Q. On August 11, 1967—strike that.
Had you kept a personal diary prior to August 11, 1967?
A. Yes, I did.
Q. Had that been seized on that date?
A. Yes, it was.
Q. Was that finally returned to you on that date?
A. Yes.
Q. What was yours and Alan's reaction to Mr. Brick returning these personal letters?
Mr. BRESS. I object, Your Honor. It is irrelevant.
The COURT. She may answer.
The objection is overruled.
The WITNESS. I was horrified.

By Mr. STAVIS:

Q. What was Alan's reaction?
A. He was very angry.
Mr. BRESS. I object. Hearsay.
The COURT. The objection is sustained.

By Mr. STAVIS:

Q. What did you observe as to his reaction?
A. I observed that he was extremely angry at Mr. Brick.
Q. Did you hear Mr. Brick make comments about some of these personal items?
A. Yes.
Q. Would you say these comments were flattering or—
[707] Mr. BRESS. I object.
The COURT. The objection is sustained.

By Mr. STAVIS:

Q. Do you recall what those comments were?

Mr. BRESS. Irrelevant, Your Honor.
The COURT. I will sustain the objection to that.

By Mr. STAVIS:

Q. Do you recall your appearance at the hearing in March of 1969?
A. Yes.
Q. Do you remember hearing Senator McClellan read a statement?
A. Yes.
Q. Did that statement tell the truth of the seizure of your records by the State officials?
Mr. BRESS. Irrelevant, Your Honor.
The COURT. The objection is sustained.

By Mr. STAVIS:

Q. What happened on August 11, 1967?
Mr. BRESS. Objection, Your Honor. The United States Government is not affected by what happened on that date.
The COURT. The objection is sustained.
Mr. BRESS. It has nothing to do with this case.

By Mr. STAVIS:

Q. Did you on October 8, 1967 know that Mr. Brick had [708] come to Pikeville and taken the records which had been seized from you on August 11, 1967?
A. No, I didn't.
Q. When did you first find out that Mr. Brick had taken the records—the records that had been seized from you on August 11, 1967?
Mr. BRESS. I submit that is equally irrelevant.
The COURT. She may answer. The objection is overruled.
The WITNESS. Well, the first time I knew it for sure is when he said it in Court.

By Mr. STAVIS:

Q. Was that December 1st, 1967?
A. I think so.
Q. And even then and not until November 8, 1968, did you know exactly what he had taken?
Mr. BRESS. Objection.
The COURT. The question is objectionable. The objection is sustained.

By Mr. STAVIS:

Q. On December 5, 1967, when he said he had taken some documents, did he reveal which they were?

A. No.

Q. When was the first time that you knew what it was that he took?

[709] A. When I saw those Xerox copies that said what he took.

Q. On November 8, is that it?

A. Yes.

Q. 1968?

A. Yes, sir, that is correct.

Q. Now, did you hear your attorney Mr. Kunstler address the Senator?

A. Several times.

Q. And did you see Mr. Kunstler hand to Senator McClellan a copy of the complaint which has been marked Defendants' Exhibit 1 for identification?

A. Yes.

Q. What was that document?

Mr. BRESS. I didn't hear you.

By Mr. STAVIS:

Q. What was that document?

Mr. BRESS. Counsel has described it as the complaint.

By Mr. STAVIS:

Q. Did you——

A. Am I supposed to answer that question?

The COURT. If you know, you may. Do you know what the document is?

The WITNESS. I don't know what he said.

The COURT. I think you are probably better qualified to say what it is than the witness.

[710] Mr. STAVIS: Let me withdraw that question.

By Mr. STAVIS:

Q. Had you worked with Mr. Kunstler in the preparation of that document?

A. Yes, we had, both of us had.

Q. Did you and Al?

A. Yes.

Q. And did that document express your own personal thoughts put in legal language by Mr. Kunstler?

Mr. BRESS. I object.

The COURT. The objection is sustained.

By Mr. STAVIS:

Q. And you saw Senator McClellan receive a copy of this document, is that correct?

A. Yes.

Mr. STAVIS. Excuse me a moment, Your Honor.

I want to get our bearings here.

The COURT. Yes.

By Mr. STAVIS:

Q. Mrs. McSurely, you remember the Chairman at Page 268 asking you whether you would produce certain documents and do you remember giving him the answer, "For all the reasons that Mr. Kunstler told you."

We are not going to produce the documents.

Mr. BRESS. Are you reading this?

[711] Mr. STAVIS: Yes.

Mr. BRESS. You are not reading it accurately.

Mr. STAVIS. Perhaps we are not looking at the same portion.

Mr. BRESS. Page 2968 now.

Mr. STAVIS. Very good.

By Mr. STAVIS:

Q. Let's try it again.

"For all the reasons which Mr. Kunstler told you, we are not going to produce the documents and I don't want to talk about it in a closed session."

Do you remember saying that?

A. Yes.

Q. And were those the reasons that were embodied in this complaint which was——

Mr. BRESS. I object.

By Mr. STAVIS:

Q. Were they embodied in the complaint which was marked as Defendants Exhibit 1 for identification?

The COURT. The objection is sustained.

By Mr. STAVIS:

Q. Well, what were the reasons, Mrs. McSurely, that you——

Mr. BRESS. The reasons the witness stated in the record.

[712] The COURT. You may proceed.

By Mr. STAVIS:

Q. Why didn't you produce the records, Mrs. McSurely?

A. Well, essentially we expressed the reasons in the complaint and that is why we had a lawyer.

Q. Perhaps you can express it in your own words.

A. Yes.

Well, in the first place, we didn't know exactly what—we didn't know exactly what it was they wanted because Mr. Brick had indicated that—that the Senator wanted—what the Senator wanted was generally what was in that bunch of Xerox letters and there were a lot of things included in that.

I could not understand what they—why he would want them.

I didn't really know exactly what he wanted and in the second place, they took out of our house the names and addresses and letters from a lot of friends who are very important people and I wasn't about to let the—to turn over and subject our friends to the same kind of harassment that we had been getting because if Senator McClellan got these names and addresses and published them, he would turn over to the Klu Klux Klan the names of our friends in the South and in the mountains and so I wasn't—I wouldn't do that to my friends.

[713] They are more important to me than that and in the third place, we had been in Court for a long time to stop the subpoenaes and just reason told us that we had the right to.

Judge Cellebreeze told us that we had the right to.

Mr. BRESS. I object.

The COURT. The objection is sustained.

You can't tell us what he told you.

By Mr. STAVIS:

Q. Apparently you can't tell us what Judge Cellebreeze told you. Continue.

A. Well, the reasons were that we were contesting this in Court.

Q. And you had been contesting this in Court since when?

A. Since it first started. Since it first started, all of this whole dirty mess.

Q. And you were then contesting it in Court, weren't you?

A. Yes.

Mr. BRESS. I object. She has answered it.

Mr. STAVIS. Your witness.

CROSS-EXAMINATION

By Mr. BRESS:

Q. Mrs. McSurely, apart from what was said in the complaint that you referred to which the Court has concluded, did you say in words anything else before the Senate Committee [714] other than what was read to the jury in this transcript of the proceedings which I read yesterday?

A. You mean is this accurate, the transcript?

Q. Yes.

A. As far as I can tell.

Q. Did you say anything to the Committee other than what is reported to have been said in this book?

Mr. STAVIS. That was answered.

The COURT. That is overruled. You may answer. This is proper cross-examination.

The WITNESS. I already answered that.

By Mr. BRESS:

Q. I know you said it was accurate.

I want to know if you said anything additional to the Committee other than what is in this book or is it so accurate that you mean to say that you said nothing else?

Is that too complex?

Mr. STAVIS. Yes.

The COURT. Rephrase your question.

By Mr. BRESS:

Q. Did you say anything to the Committee other than what was read to the jury yesterday from this book? Just answer that yes or no.

Mr. STAVIS. I object, Your Honor. I suppose that this complaint, which was not read yesterday, could be included [715] in that record.

The COURT. The objection is overruled. You may proceed. That is a proper question.

The WITNESS. Well, I thought that——

By Mr. BRESS:

Q. I will restate my question, Mrs. McSurely.

The words you used before the Committee, apart from what your lawyer Mr. Kunstler said to the Committee, did you say any words or utter any words in addition to those that were read yesterday from this transcript?

A. No, he was speaking for us.
Q. Very good.
A. He was speaking for us when he filed that complaint.
Q. Now, you did not bring any of the records called for in the subpoena to the Committee hearing on March 4, did you?
A. No.
Q. And you did not bring any of the records to the Committee at any time after that and up until noon of March 7?
A. No.
Q. And you do admit that you were served with a subpoena on November 8, 1968?
A. I was served with an invalid subpoena.
Q. I see.
I say you were served with a subpoena by the Committee on November 8, 1968?
[716] Mr. STAVIS. It was served by a Marshal, wasn't it?

By Mr. BRESS:

Q. You were served with a subpoena and the Committee served it through a Marshal.
The subpoena that has been introduced in evidence here, showing that you were served on November 8, 1968, you admit you were served, don't you?
The COURT. Don't shake your head.
The WITNESS. Yes, I got that subpoena on November 8, 1968.

By Mr. BRESS:

Q. And you say that you remember Senator McClellan reading at the opening of the hearing on March 4, 1968, the so-called opening statement that you were asked about on direct examination?
A. Yes.
Q. You remember hearing that?
A. Yes.
Q. You understood what he said, did you not?
A. I didn't agree with what he said.
Q. I didn't ask you that.
A. I understood his words, yes.
Q. Did you understand the meaning of the words?
A. Yes.
Q. You were aware then of what he was talking about?

[717] A. Yes, he was expressing his views.
Q. You were aware of what he was talking about, whether you agreed with him or not?
A. Right.
Q. And you were aware that the Committee was conducting a hearing investigating riots and civil disorders, were you not?
A. I was aware that some of them thought that is what they were doing.
Q. Do I understand you that in the presence of this jury to be telling me that you don't believe that they were engaged in an investigation of riots and civil disorders pursuant to the resolution of the Senate?
A. I don't think they were doing a good job.
Q. I didn't ask you whether or not they were doing a good job. I asked you if you understood that that is what they were pretending to do.
Mr. STAVIS. That is the particular point, Your Honor.
The COURT. Excuse me.
We will have no further outbursts in the courtroom.
Mr. STAVIS. I object. Mr. Bress is arguing with the witness.
The COURT. It is proper cross-examination and the objection is overruled.
You may proceed.
[718] By Mr. BRESS:
Q. Do you understand my question, Mrs. McSurely?
Mr. STAVIS. What was the question?
Mr. BRESS. I will rephrase it.
Mr. STAVIS. Why don't we just have it re-read, Mr. Bress.
The WITNESS. Yes.
Mr. BRESS. Very well.
(Whereupon, the last question was read.)

By Mr. BRESS:

Q. And did you understand that what they thought they were doing was investigating riots and civil disorders in the United States under a mandate of the United States Senate?
A. That is what they thought they were doing.
Q. You didn't agree with them, though, did you?
A. They were not really doing that.
Q. I said you didn't—you didn't agree with them in what they were doing?
A. In reality, they weren't really investigating the riots.

Q. And is that a factor that prompted you not to produce the records?

A. That—no, I told you why I didn't produce the records.

Q. All right.

[719] I am asking you now is the fact that you disagreed with their way of investigating riots, is that a reason why you give now or that you relied upon for not producing the records?

Mr. STAVIS. I object. The question has been asked and answered.

The COURT. This is cross-examination. That is a proper question.

The WITNESS. I already told you all the reasons why I didn't turn them over.

By Mr. BRESS:

Q. I am asking you if that was one of them?

A. No.

I think I have plenty of reasons for not turning them over.

Q. So you did not fail to turn over the records because you disagreed in the manner in which the Senator was investigating riots?

A. I didn't——

Mr. STAVIS. Are you clear as to the question?

The WITNESS. No.

The COURT. Rephrase the question.

Mr. STAVIS. It has a double negative.

By Mr. BRESS:

Q. Your refusal to produce the records was not motivated [720] because of any disagreement with you on the way Congress was going about its business?

Mr. STAVIS. I object

The COURT. The objection is overruled. You may answer.

The WITNESS. In other words, I disagreed with how they were——

Are you asking me if I disagreed with how they were running the Committee?

The COURT. Read the question back.

(Whereupon, the question was read.)

The WITNESS. Yes, I vehemently disagreed with the way they were going about this.

The COURT. Read the question again.

(The question was read.)

The WITNESS. No, I already—I didn't disagree with what they were—how they were doing that, but that wasn't the reason why I didn't turn the stuff over.

The reason why was because I wasn't going to hurt my friends and I wasn't going to—I didn't think they had a right to my personal papers and I have already given you all the reasons.

By Mr. BRESS:

Q. Your refusal to deliver the records then was an intentional refusal?

[721] Mr. STAVIS. What is that, Your Honor?

By Mr. BRESS:

Q. Your refusal to deliver the records then was an intentional refusal?

Mr. STAVIS. I object.

The COURT. The objection is overruled. You may answer.

The WITNESS. Well, we filed a lawsuit.

The COURT. You can answer that question yes or no.

The WITNESS. What was the question?

The COURT. Read the question back, please.

(Whereupon, the question was read.)

The WITNESS. On the basis of all those other reasons, of course, we made the decision not to do it.

By Mr. BRESS:

Q. You intended to refuse to produce for whatever reasons you may have already told us, is that correct?

A. Constitutional reasons.

Q. For whatever reasons you have already given us, it was your intention and intent to refuse and you had made up your mind to do that before you went to the Committee?

A. Until it was settled in Court, right.

Q. And that act on your part was deliberate, was it not?

A. Yes.

Mr. BRESS. That is all.

• • • • •

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 516–69

ALAN MCSURELY, ET AL., PLAINTIFFS

v.

JOHN L. MCCLELLAN, CHAIRMAN, ET AL., DEFENDANTS

DEFENDANTS' MOTION FOR RECONSIDERATION OF ORDER FILED JUNE 12, 1973 OR, ALTERNATIVELY, FOR CERTIFICATION PURSUANT TO 28 U.S.C. 1292 (b)

The defendants McClellan, Adlerman, O'Donnell and Brick, through their undersigned attorneys, hereby move for (1) reconsideration of the Court's order filed June 12, 1973, denying defendants' motion to dismiss or for summary judgment or, in the alternative, (2) request that the Court certify, pursuant to 28 U.S.C. 1292(b), the issue whether the defendants are officially immune with respect to the allegations in the complaint against them. This motion is based, in part, on the recent decision of the Supreme Court in *Doe* v. *McMillan*, ———— U.S. ———— (No. 71-6356, May 29, 1973), 41 U.S.L.W. 4752. In support of this motion, the Court is respectfully referred to the defendants' memorandum of points and authorities attached hereto.

Respectfully submitted.

HARLINGTON WOOD, Jr.
Assistant Attorney General,
HAROLD H. TITUS, Jr.
United States Attorney.
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Filed JUNE 27, 1973.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 516–69

ALAN MCSURELY, ET AL., PLAINTIFFS

v.

JOHN L. MCCLELLAN, CHAIRMAN, ET AL., DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that the federal defendants, John L. McClellan, Jerome S. Adlerman, John Brick, and Donald F. O'Donnell, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the orders entered in this case by the district court on June 12, 1973 and July 9, 1973.

RAYMOND D. BATTOCCHI,
Attorney,
Department of Justice,
Washington, D.C. 20530,
Attorney for Federal Defendants.

Filed AUGUST 6, 1973.

JAMES F. DAVEY, *Clerk.*

U.S. GOVERNMENT PRINTING OFFICE: 1977

Supreme Court, U. S.
FILED
AUG 22 1977
MICHAEL RODAK, JR., CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM—1976

76-1621

SENATOR JOHN L. McCLELLAN, *et al.*,

Petitioners,

vs.

ALAN McSURELY and MARGARET McSURELY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

The government's statement omits two of the most critical facts in this case which indeed make it so "unusual," the term used by Judge Leventhal (34a).

First, at page 5 of the government's petition, there is a failure to note that prior to the time that Mr. Brick took the 234 documents to Washington on October 12, 1967, he had learned that the United States District Court on September 4, 1967, had already found that the seizure by Kentucky officials had been under an unconstitutional statute and had ordered the documents held in "safekeeping." Indeed, on October 9, 1967, Mr. Brick had examined the District Court's order to that effect. Three days later, in direct violation of the court order he had just read, he took the 234 documents, without notice to McSurelys.

Secondly, the government's statement completely fails to note that among the 234 documents were clearly personal items such as, among other things, a love letter which Mr. Brick admitted he took although, having inspected the documents, he knew at the time that the letter and "many" of the other documents were not "needed at all" for the performance of his duties for the United States Senate. Some of this personal material was then displayed, at least to Senator McClellan, and retained by the Senator. 1/

1/ The letter was from columnist Drew Pearson and was addressed "Dearest Cucumber." There was also a personal diary of Margaret McSurely and other intimate correspondence, some of which referred to or emanated from Mr. Pearson.

As stated by Judge Leventhal in his opinion, "[t]his case is unusual because Brick in testimony at the McSurelys' contempt trial conceded that when 'he went to Pikeville to examine the documents in the Court House,' he looked through the papers and books and determined there were 'many' items that he 'didn't need at all,' including a letter addressed to plaintiff Margaret McSurely, as 'Dearest Cucumber,' from a prominent newspaper columnist." (34a-35a)

By the two omissions referred to above the government's statement seeks to sanitize this record and make it appear that the case involved a legitimate exercise of investigatory power by a Senate committee employee. In fact, what the case involves is an admitted abuse of legislative investigatory power.

The main legal position of the government has as little validity as its distorted view of the facts. It is literally that even if conduct which intrudes upon the rights of a private citizen is admittedly not necessary for the performance of legislative duties, a mere assertion that the act was undertaken pursuant to a broad penumbra of "preliminary investigative activities" is enough to bring into play the immunity of the Speech or Debate Clause. That is not--and cannot be--the law.

REASONS WHY THE PETITION SHOULD BE DENIED.

I.

The first of the government's "questions presented" reads:

> "1. Whether the Speech or Debate Clause bars a private suit for damages against a Senator and his aides, alleging that some of their investigatory activities, in connection with a subject on which legislation may be had, were improper or unconstitutional."

The government baldly argues that "[t]he court's authority is at an end once it has determined that the conduct in question is related to a legitimate legislative function" (underscoring supplied; G. Pet. 13). Although on some issues the lower court was equally divided, all of the judges of the court below rejected the foregoing argument. 2/

2/ Judge Wilkey, speaking for himself and the four judges who did not agree with Judge Leventhal's Fourth Amendment analysis, agreed that the Speech or Debate Clause did not provide the immunity claimed by the government. See Judge Wilkey's opinion, 55a, fn. 3, which reads as follows:

> "The majority states the principle, which we endorse, that investigative activity is so essential to the legislative process that it is ordinarily absolutely privileged, provided, of course, that the basic conditions of authorization and pertinency are established. Maj. op. at 17-19. But this absolute privilege can be lost where the investigator engages in a search and seizure in violation of the Fourth Amendment. Dombrowski v. Eastland, 387 U.S. 82 (1967), cited by the majority at 19.

The government's contention here is indeed exactly the argument presented to this Court by Senator Brewster, who urged "that the Clause [Speech or Debate] protected from executive or judicial inquiry all conduct 'related to the due functioning of the legislative process,'" United States v. Brewster, 408 U.S. 501, 513 (1972). This Court rejected that argument and said:

> "In no case has this Court ever treated the Clause as protecting all conduct relating to the legislative process." (Emphasis in original; id. at 515.)

The Court said further:

> "The sweeping claims of appellee would render Members of Congress virtually immune from a wide range of crimes simply because the acts in question were peripherally related to their holding office." Id. at 520.

With respect to the first "question" propounded by the government, the decision below is clearly correct upon two independent considerations:

a) Where a legislator or a legislative employee purports to exercise the investigative power of Congress, the question of whether the conduct may fairly be deemed to have been authorized by Congress and whether Congress had the power to give such authorization necessarily comes to the fore. Thus, this Court noted in Servicemen's Fund, "although the power to

investigate is necessarily broad it is not unlimited. Its boundaries are defined by its source." 421U.S. at 504. And when those boundaries are crossed, the conduct is perforce non-legislative, regardless of the forms employed.

Servicemen's Fund emphasized that even as to the issuance of a subpoena--plainly a facially legislative device--the question of legislative jurisdiction remained open because "Congress is not invested with a general power to inquire into private affairs," and "the subject of the inquiry must be one of which legislation could be had," 421 U.S. at 504.

The "unusual" feature of this case which gives it a hornbook quality is that a key defendant, who was also an agent of Senator McClellan, admitted that he was acting outside the performance of his legislative duties.

Officious meddling into Margaret McSurely's private and intimate correspondence is, just like taking a bribe, "obviously no part of the legislative process or function," United States v. Brewster, supra, at 526.

b) Brewster, it should be noted, involved a claim of immunity for acts "related" to conduct which was at the core of legislative activity, i.e., voting in respect to postal laws. Here the government claims absolute immunity for conduct which, at most, is related to peripheral legislative activities, namely, anything that may be encompassed within the broad spectrum of "preliminary investigative activity."

This Court has consistently drawn a distinction between conduct defined as merely "relating to the legislative process," Brewster, supra, 408 U.S. at 515, and conduct which is "an integral part of the deliberative and communicative process," Gravel v. United States, 408 U.S. 606, 625 (1972). In short, there is a difference between a Senator's making a speech on the floor of the Senate and his engaging in the myriad of activities every Member of Congress undertakes which are not at the heart of the legislative process, Brewster, at 516. And there is a difference between issuance of a subpoena, as in Eastland v. United States Servicemen's Fund, supra, 421 U.S. 491 (1975), and acts done in the course of a preliminary investigation. It could never be seriously contended that everything done by a Congressional investigator as part of a preliminary investigation is "an indispensable ingredient of law making," Servicemen's Fund, at 505.

And in Servicemen's Fund this Court left no doubt but that the issuance of a subpoena was markedly different from the circumstance where Members of Congress "themselves seized property or invaded the privacy of a citizen. 421 U.S. at 507.

A preliminary investigation is not a subpoena. If there is any line which distinguishes conduct which merely "relates" to the legislative process from conduct which is an "integral part" of that process, surely there must be a distinction between a subpoena and a preliminary investigation.

Investigative activity can include almost any

kind of conduct: Search, seizure, electronic surveillance, assault, blackmail, theft of documents, bribery, extraction of a confession by torture, false imprisonment, sexual seduction, breaking into a psychiatrist's office, and every conceivable technique--fair or unfair, lawful or unlawful--that investigators employ.

A subpoena is a formal exercise of the compulsory process in an investigation. It is a well-defined, observable exercise of power, generally requiring specific authority by a Senator or Member of Congress. A subpoena's regularity and scope can be, and often are, subjected to judicial scrutiny if an effort is made to enforce it against a recalcitrant witness.

"Preliminary investigation" is, by contrast, any undefined activity which a Congressional employee claims he is engaging in in the hope of obtaining information. It cannot be described by scope or content. Short of a lawsuit, such as in this case, there is no way of testing the lawfulness of the conduct.

The government argues that "an immunity that would protect only when no wrong has been committed is no immunity at all" (G. Pet. 14). That may be so and precisely because of that fact immunities are not so easilydistributed to every staff employee or legislator who claims to be engaged in amorphous and indefinable "preliminary investigative activity"--particularly where he concedes that he was not performing a legislative function. And that is why the opinions of both Judges Leventhal and Wilkey agree that

violations of Constitutional rights in the course of the exercise of preliminary investigatory activites are not immune under the Speech or Debate Clause and that of course is the specific holding of Dombrowski v. Eastland, 387 U.S. 82 (1967).

II.

At page 16 of its petition the government argues that the decision of the Court of Appeals is inconsistent with Dombrowski v. Eastland, supra, because allegedly the record is silent on the involvement of defendants McClellan, Adlerman, and O'Donnell.

We observe at the outset that this issue is hardly encompassed in the "questions presented." Beyond that, however, the issue is wholly beyond the pleadings before the District Court, 3/ or

---

3/ The "Motion to Dismiss or in the Alternative for Summary Judgment," as filed in the District Court by the government, states the following as its "grounds":

1. Defendants are immune from actions for damages where, as here, it is clear that their conduct was within the sphere of legislative activity.

2. The complaint fails to state a claim upon which relief can be granted against defendants who were a U.S. Senator or employees of the Senate at all times material to this cause.

[Footnote continued on next page.]

the argument before the Circuit Court. 4/

Aside from the misstatement of fact in the government's footnote 14, 5/ we find it difficult to believe that the Court would reach for an issue which had never been presented or considered below, let alone pleaded. Cf., Paschall v. Christie Stewart, 414 U.S. 100 (1973).

[Footnote 3 continued:]

3. Plaintiffs are barred by collateral estoppel from re-litigating issues previously settled by the judgment in United States v. Alan McSurely and Margaret McSurely, Cr. Nos. 1376-69 and 1377-69.

The government's Motion for Reconsideration of Order filed June 13, 1973, or, Alternatively, for Certification Pursuant to 28 U.S.C., §1292(b)" supplies no additional grounds and simply repeats the claim that "the defendants are officially immune with respect to the allegations in the complaint against them."

4/ Inspection of the briefs filed by the government in the Circuit Court reveals that the issue here proffered was never offered to the Circuit Court.

5/ Petitioners' affidavits could hardly be considered as "denying involvement" and respondents did indeed introduce affidavits which disputed every material fact offered by petitioners.

III.

The government contends that "as a matter of law, Brick committed no improprieties warranting imposition of civil liability." This contention is essentially based on the argument that even if the prior conduct of state officers was illegal, there was no impropriety in Senate investigators employing the fruits thereof if they were handed to them on a "silver platter." The government here seeks to encapsulate Judge Wilkey's argument.

The flaw in this contention is fully demonstrated in the supplement to Judge Leventhal's opinion.

What distinguishes this case from those cited by the government (e.g., United States v. Calandra, 414 U.S. 338 [1974], United States v. Janis, 428 U.S. 433 [1976]) is that here the McSurelys, victims of the unconstitutional seizure, had gone to court, sought judicial relief against the initial seizure, and obtained a court order requiring the safekeeping of the documents.

It is inconceivable that Calandra or any other case could be interpreted to hold that 1) even where the aggrieved citizen has gone to court to obtain relief from an unlawful seizure, 2) has obtained an adjudication that it was indeed unlawful, and 3) has an order of a court that the items be kept in safekeeping, that nevertheless the Senate employee does not commit an independent violation when he surreptitiously obtains the documents which were supposed to be in safe

keeping. To so hold makes a mockery of the judicial process, the only remedy available to the citizen who has been victimized by unlawful search and seizure. Mr. Justice Powell in his opinion in Calandra emphasized that the citizen who was the object of an unlawful search was not "left remediless." "He may," said Mr. Justice Powell, "seek the return of the illegally seized property," 414 U.S. at 354, n. 10, and if he does, and obtains a court order for the safekeeping of his property, can it be seriously suggested that no new violation of his rights has been effected when another official surreptitiously takes the seized property behind the back of the court?

Thus, Judge Leventhal's opinion says quite correctly:

"[O]ur ruling is based on the investigator's own unlawful activity--the inspection and transportation of copies of materials in violation of a three-judge federal district court order.

"We need not be detained by Judge Wilkey's traverse of cases like Calandra, Elkins and Sherwin. What makes all the difference in the world is that in this case a Federal court did issue an order, did make a determination that papers and other material had been seized by state authorities under an unconstitutional statute, did assert custody over the seized documents, and that investigator Brick examined them and took copies without resort to the procedures of the Federal court that had intervened and asserted

control over the materials. It would not be analysis but legerdemain, to characterize Brick's actions in violation of a court order as part of a subsequent 'transfer' inherently unreachable under the Fourth Amendment. The case is entirely different from Calandra.

"We do not think it can be seriously argued that conduct like Brick's, compounding his own inspection of documents with transportation to permit access by others, fails to state a Fourth Amendment violation in a case where there has been a court order that establishes a custodian with possession (pending appeal) of papers seized unlawfully from plaintiffs, and provides that any other access requires court approval (in the absence of permission by plaintiffs).

"Judge Wilkey misses the point in his argument (e.g., at p. 29 ff.) that Brick's activity involves no legal injury not already wrought by the state officials. Even assuming for discussion plaintiffs had no valid claim against any state officials for the seizure from their home, perhaps on the theory that the taking was under a warrant to enforce a state sedition statute not yet held unconstitutional, plaintiffs may nevertheless maintain anaction against Brick for his inspection and taking of papers after the federal court held invalid both the state statute and the continued retention of the seized materials by the state prosecutor except as a court custodian." (46a-48a)

IV.

Finally, the government objects to that portion of the order which required further proceedings concerning the dissemination of the documents outside of Congress. The government supports its contentions by two misstatements of the record:

1. "There was no such order to affirm." (G. Pet. 19)

Since the District Court's order denied in its entirety the government's motion to dismiss or alternatively for summary judgment, everything that was in the pleadings was left in the case. Therefore, when the Circuit Court affirmed the order of the District Court insofar as it required further proceedings concerning the dissemination of documents outside of Congress, it was in fact affirming what the District Court had ordered.

2. "Respondents' allegations of dissemination were made for the first time in the court of appeals; since the complaint did not make any allegations concerning dissemination, the district court had no entered any pertinent order." (Ibid.)

Paragraph 19 of the Amended and Supplemental Complaint includes, among other allegations, the following:

> "Thereupon, defendant Brick did in fact and without the knowledge of the plaintiffs, inspect the private and personal

> correspondence and papers of the plaintiffs, obtained photographs and copies of 242 items, and took them back to Washington, D.C., where he exhibited them to persons whose names are unknown to the plaintiffs, to the damage and embarrassment of the plaintiffs."

Of course the complaint did not allege--and was not required to allege--that the dissemination was to the Internal Revenue Service. The relationship between the Senate Committee and the I.R.S. was a deep, dark secret until recently revealed. But certainly the complaint included within its compass the dissemination of the papers to persons outside Congress.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: August 17, 1977.

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No. 76-1621

In the Supreme Court of the United States

OCTOBER TERMS, 1977

SENATOR JOHN L. MCCLELLAN, ET AL., PETITIONERS

v.

ALAN MCSURELY AND MARGARET MCSURELY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1977

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals *en banc* (Pet. App. 1a–130a) is reported at 553 F. 2d 1277. The opinion of the panel of the court of appeals (Pet. App. 131a–194a) is reported at 521 F. 2d 1024. A prior opinion of the court of appeals (Pet. App. 195a–211a) is reported at 426 F. 2d 664. The orders of the district court (Pet. App. 215a–217a) are not reported.

JURISDICTION

The judgment of the court of appeals *en banc* (Pet. App. 212a–214a) was entered on December 21,

1976. On March 15, 1977, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 20, 1977. The petition was filed on May 19, 1977, and was granted on October 11, 1977. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Speech or Debate Clause bars a private suit for damages against a Senator and his aides, alleging that some of their investigatory activities, in connection with a subject on which legislation may be had, were improper or unconstitutional.

2. Whether the court of appeals properly ruled on an allegation of dissemination of documents that was not presented to or decided by the district court.

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 6, clause 1 of the Constitution provides:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

STATEMENT

1. On August 11, 1967, a state judge in Kentucky issued a warrant authorizing a search of respondents' house for seditious literature (A. 76; Pet. App. 6a). State officials executed the warrant that evening, seized a large volume of books, posters, pamphlets, and other materials found in the house, and arrested respondents for criminal sedition, in violation of Ky. Rev. Stat. § 432.040 (1962) (Pet. App. 6a).

On August 16, 1967, respondents sought a federal injunction against their prospective state prosecution; their complaint also requested the return of the seized materials. A three-judge district court was convened. By a divided vote the court declared the Kentucky sedition statute unconstitutional on its face as a violation of the First Amendment and enjoined the prosecution of respondents, who by then had been indicted. *McSurely* v. *Ratliff*, 282 F. Supp. 848 (E.D. Ky.) The court appointed Commonwealth's Attorney Thomas B. Ratliff custodian of the seized materials and directed him to hold the materials in safekeeping until final disposition of any appeal (Pet. App. 6a–7a, 60a–61a). The "safekeeping" order (A. 78) was entered on September 14, 1967.[1]

2. At all times pertinent to this case, the Permanent Subcommittee on Investigations of the Committee on Government Operations of the United States Senate

[1] Many of the other documents in the injunctive action in Kentucky are reproduced as appendices to the jurisdictional statement in *McSurely* v. *Ratliff*, No. 1113, October Term, 1967.

(the Subcommittee) was authorized by resolution of the Senate "[t]o make a full and complete study and investigation of violent disurbances of the peace [and] * * * civil and criminal disorder" (A. 19; Pet. App. 158a–159a and n. 66), with a view to ascertaining the nature and causes of such disturbances and recommending any appropriate legislation. In October 1967 a subcommittee attorney discussed respondents' activities by telephone with Ratliff, and John Brick, an investigator for the Subcommittee, was dispatched to meet Ratliff (A. 19; Pet. App. 7a).[2]

Ratliff told Brick that the materials seized from respondents contained references to a meeting immediately preceding a riot in Nashville, Tennessee, and to organizations suspected of instigating riots. Brick was permitted to examine some of the seized materials.[3] He obtained copies of 234 of the documents and returned to Washington with these copies (A. 19, 20, 96–97 Pet. App. 7a–8a). He did not take any originals.

[2] Between 1965 and 1968 a number of major civil disturbances took place in large cities, in the course of which 189 persons were killed and another 7,615 injured. S. Rep. No. 91–137, 91st Cong., 1st Sess. 1 (1969). One of these riots occurred in Nashville, Tennessee, during April 1967, and the Subcommittee acquired information that appeared to link respondents to that disturbance (Pet. App. 18a).

[3] Ratliff did not notify respondents of his action or seek formal permission of the three-judge court to act as he did. He later gave uncontradicted testimony, however, that before he allowed Brick to see the materials he spoke with one of the three judges of the court and received permission to grant access to Brick (Pet. App. 29a n. 54, 63a).

Brick was aware of the district court's "safekeeping" order, although there has been no allegation that he believed that his actions violated that order (A. 97, 103). Brick obtained copies of a number of "personal letters" of respondents (Pet. App. 34a–36a and nn. 63–65). He later stated that he did not "need" "some" of the letters (*id.* at 35a n. 65).[4] The most personal letter was sealed and placed in a safe to prevent disclosure (A. 98–100; Pet. App. 42a n. 74).

On October 16, 1967, Senator John L. McClellan, the Chairman of the Subcommittee, signed subpoenas directing respondents, Ratliff, and the United States Marshal to produce documents in their possession pertinent to the meeting in Nashville preceding the riot there and to respondents' membership in or employment by several organizations (A. 23–25; Pet. App. 8a). Respondents requested the three-judge district court to prohibit Ratliff and the Marshal from complying with the subpoenas; respondents also requested return of the materials.[5] On October 30, 1967, the court denied these requests and directed all parties to the case "to cooperate with the Senate Committee in making available such of the materials, or copies thereof, as the Committee considers pertinent to its

[4] Brick made this statement in the course of cross-examination during respondents' trial for contempt of Congress (see pages 7–8, *infra*). He explained that he took copies of the relevant documents because they were given to him, and he "didn't select any of these" (A. 97, 102; Pet. App. 36a n. 65; cf. *Id.* at 26a n. 49).

[5] See pages 6a–9a of the jurisdictional statement in No. 1113, October Term, 1967.

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inquiry."[6] This Court stayed that order pending the district court's consideration of respondents' objections to the subpoenas. *McSurely* v. *Ratliff*, 389 U.S. 949.

On December 14, 1967, the three-judge district court rejected respondents' objections to the subpoenas and ordered Ratliff to allow persons on the Subcommittee staff to make photocopies of the documents.[7] On January 29, 1968, this Court stayed the order pending consideration of respondents' appeal (390 U.S. 914),[8] which it dismissed on March 18, 1968, for want of jurisdiction (*McSurely* v. *Ratliff*, 390 U.S. 412).

Respondents then appealed the disclosure order to the court of appeals, which reversed. *McSurely* v. *Ratliff*, 398 F. 2d 817 (C.A. 6). The court of appeals ordered the documents returned to respondents because (*id.* at 818) "[t]he business of the District Court in this case has been completed. The right of the Court to retain possession of the seized documents, which include no contraband, has expired." The court of appeals stated that its order was without prejudice to the right of the Subcommittee to enforce its subpoenas against respondents (*ibid.*).

3. Following this decision by the court of appeals, Brick returned to Kentucky officials the copies of the 234 documents that he had taken earlier (A. 50, 97–98;

[6] *Id.* at 4a.

[7] See pages 1a–3a of the jurisdictional statement in No. 1113, October Term, 1967.

[8] The stay pertained only to the delivery of the original documents; it did not bar the delivery of photocopies.

Pet. App. 8a n. 13) Ratliff returned the original documents to respondents on November 8, 1968. The United States Marshal simultaneously served respondents with new subpoenas requiring them to testify before the Subcommittee and to bring certain documents with them (*id.* at 9a). Respondents appeared before the Subcommittee on March 4, 1969, but they refused to produce the requested materials (*ibid*).

The Senate cited respondents for contempt of Congress. See S. Res. 191 (and the accompanying report), 91st Cong., 1st Sess. (1969). They were indicted and convicted of that offense after a jury trial in the United States District Court for the District of Columbia. The court of appeals reversed. *United States* v. *McSurely*, 473 F. 2d 1178 (C.A.D.C.). The majority of the panel concluded that the search warrant issued by the Kentucky judge in 1967 was based on an affidavit that did not state sufficient facts to permit the judge to make an independent evaluation of probable cause and that the search warrant was overly broad (*id.* at 1185–1190). The majority held that the subpoena should have been suppressed at trial as the "fruit of the poisonous tree." *Id.* at 1191–1194.[9] The court explicitly declined to consider re-

[9] Judge Wilkey, concurring in the result, argued that congressional committees should be entitled to base subpoenas on knowledge gained from unconstitutional seizures by state officials. 473 F. 2d at 1194–1202. He concluded, however, that the materials sought by the subpoena were not pertinent to the Subcommittee's inquiry (*id.* at 1203–1204).

spondents' argument that the seizures were improper because they had been carried out in aid of a statute later declared to be unconstitutional. *Id.* at 1190 n. 38.

4. On March 4, 1969, the same day they appeared before the Subcommittee, respondents filed the present suit (A. 4–25), seeking money damages and an injunction against any potential criminal prosecution. The district court stayed the civil proceedings to allow the criminal trial for contempt of Congress to proceed; the court of appeals affirmed, although it remanded for further consideration of some collateral matters (Pet. App. 195a–211a).

In September 1971, while the court of appeals was considering the appeal from their convictions for contempt of Congress, respondents filed an amended complaint (A. 26–38), naming as defendants Ratliff and the four petitioners.[10] They sought $50,000 in

[10] The four petitioners are Senator John L. McClellan and three persons who were employees of the Subcommittee during 1967: Jerome S. Adlerman, then General Counsel of the Subcommittee; Donald F. O'Donnell, then Chief Counsel of the Subcommittee; and John Brick, then an investigator for the Subcommittee (see A. 26, 47). Petitioner O'Donnell has retired.

Two petitioners died while the case was in the court of appeals, Brick on October 15, 1973, and Adlerman on October 1, 1975. See Pet. App. 4a n. 1. We have been advised that both Brick and Adlerman left wills that were not probated, that their estates have no representatives, that all assets in the estates have been transferred to their surviving wives, and that respondents did not seek to substitute the survivors or estates for Brick and Adlerman until August 1977. Under these circumstances the actions against Brick and Adlerman appear to have abated. "[T]he law of the place of the wrong determines whether the claim for damages survives the death of the wrongdoer." *Ormsby* v. *Chase*, 290 U.S. 387, 388. Although we conceded in the court of appeals that the claims

damages from each petitioner (A. 37). The complaint alleged, in essence, that petitioners conspired with Ratliff to: (1) carry out the illegal search and seizure of their documents in 1967; (2) inspect and transport to Washington copies of 234 of those documents; (3) inspect those documents in Washington; (4) use the copies as the basis for issuing the subpoena; and (5) procure the citations for contempt of Congress.

Petitioners filed a motion to dismiss or for summary judgment, contending that the Speech or Debate Clause of the Constitution immunizes them from liability for the events described in the complaint (A. 45–46).[11] The district court held a hearing on this motion and, approximately 19 months later, denied it without explanation (Pet. App. 215a). The court declined to certify the case for an interlocutory appeal pursuant to 28 U.S.C. 1292(b) (Pet. App. 216a–217a).

Petitioners appealed, and a divided panel of the court of appeals reversed, ordering the entry of sum-

against Brick and Adlerman technically survive their deaths, substitution is not permissible so long after respondents had both actual and judicial notice of the deaths. We have opposed in the district court respondents' motion to substitute. (The court of appeals declined to decide whether the action against Brick and Adlerman survived their deaths. Pet. App. 44a.)

Out of an abundance of caution, however, we have named Brick and Adlerman as petitioners on the authority of Fed. R. App. P. 43(a), under which the appeal proceedings with respect to them were permitted to go forward notwithstanding their deaths and respondents' failure to request substitution. Compare 28 U.S.C. 2105 with Rule 48(1) of the Rules of this Court.

[11] Ratliff did not move for summary judgment.

mary judgment for petitioners (Pet. App. 131a–194a).[12]

The court of appeals then heard the case *en banc*. In a brief *per curiam* order, the court unanimously instructed the district court to grant partial summary judgment for petitioners (Pet. App. 2a–3a). The court concluded that the Speech or Debate Clause gives petitioners absolute immunity from liability for the inspection or use by the Subcommittee of the 234 copies of documents and for the issuance of the subpoenas and the procurement of the citation for contempt of Congress (*id.* at 39a–43a, 54a).[13]

An equally divided court affirmed the district court's order to the extent that it would subject petitioners to trial with respect to Brick's inspection of the documents and his transportation of the 234

[12] The panel held (Pet. App. 136a–142a), and the *en banc* court unanimously agreed (Pet. App. 10a–11a n. 18), that the immediate appeal was appropriate under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541. The Speech or Debate Clause establishes a right not to be "questioned" in court for legislative activities (see *Dombrowski* v. *Eastland*, 387 U.S. 82, 85), and part of that right would be irretrievably lost if petitioners were required to submit to discovery and undergo a trial. The propriety of an immediate appeal in such a situation now has been established by *Abney* v. *United States*, No. 75–6521, decided June 9, 1977. (We discuss the meaning and implications of *Abney* more thoroughly in our brief in *United States* v. *MacDonald*, No. 75–1892, certiorari granted, June 20, 1977 .We have sent to counsel for respondents a copy of our brief in *MacDonald*.)

[13] The court further concluded that respondents had failed to make sufficiently specific allegations concerning petitioners' involvement in the 1967 search to withstand petitioners' motion for summary judgment (*id.* at 21a, 54a).

copies to Washington (Pet. App. 3a, 213a). Judge Leventhal, writing for himself and Judges Bazelon, Wright, McGowan, and Robinson, concluded that *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, established a two-part test to determine whether judicial inquiry is barred by the Speech or Debate Clause. The first part of the test, Judge Leventhal stated, is whether the activity is related to the legislative process; the second is whether the legislative process has been conducted properly. Judge Leventhal concluded that Brick's activities "may fairly be deemed within [the Subcommittee's] province" and that the investigation concerned matters "on which 'legislation could be had'" (Pet. App. 17a). Judge Leventhal thought, however, that Brick's conduct was unlawful (*id.* at 18a–39a, 46a–52a). Because, in Judge Leventhal's view, "employment of unlawful means to implement an otherwise proper legislative objective is simply not 'essential to legislating'" (*id.* at 20a), he concluded that Brick's conduct was not immune from further scrutiny.

Judge Leventhal stated that Brick's conduct violated the Fourth Amendment (Pet. App. 22a–32a) both because it violated the three-judge district court's "safekeeping" order and because the initial seizure of the documents by state officers was a violation of that amendment.[14] Judge Leventhal also apparently con-

[14] Although Judge Leventhal believed that the "safekeeping" order contained a requirement that Ratliff consult with the court before allowing copies of the documents to be made (Pet. App.

cluded that Brick's actions were improper because some of the 234 documents that he received and retained were found to be not material to the Subcommittee's investigation (*id.* at 34a–39a).

Although Judge Leventhal's discussion concentrated on the propriety of Brick's activities, and although respondents "have made no factual proffer of 'involvement in any activity that could result in [the other petitioners'] liability'" (Pet. App. 22a n. 43), he nevertheless concluded that all four petitioners must undergo further proceedings in the district court that might lead to vicarious liability for Brick's deeds (*id.* at 44a–45a).

While the case was pending in the court of appeals, respondents had learned that on occasion the Subcommittee's staff and staff of the Internal Revenue Service had access to each other's files (Pet. App. 13a-16a); respondents suggested to the court that some or all of the 234 documents might have been disseminated outside the Subcommittee, although they did not state that they had any information that this had occurred

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29a–30a, 48a, 50a), it contains no such command. Ratliff was ordered only to keep the original copies of the documents intact (A. 78), and the three-judge court itself later ordered Ratliff to make them available to the Subcommittee's staff for copying. See pages 5–6, *supra*, and pages 39–40, *infra*.

Judge Leventhal also apparently believed that the three-judge district court had declared the 1967 search to have been unconstitutional (Pet. App. 28a), but this, too, is incorrect. The three-judge court declared the statute unconstitutional and did not discuss the propriety of the search. *McSurely* v. *Ratliff*, *supra*, 282 F. Supp. at 851–854.

(A. 57–58, 65–67). Judge Leventhal wrote that further proceedings must be held in the district court concerning this claim of dissemination, and the court's judgment states that the district court's "judgment is affirmed, in part, * * * on the claim relating to the alleged dissemination of some of the documents outside of Congress" (*id.* at 213a).

Judge Wilkey, writing for himself and Judges Danaher, Tamm, MacKinnon and Robb, argued that summary judgment should have been granted for petitioners (Pet. App. 54a–116a). Although Judge Wilkey accepted Judge Leventhal's interpretation of *Servicemen's Fund* and concluded that petitioners would not be immune if Brick's conduct had been improper (*id.* at 55a n. 3), he disputed Judge Leventhal's conclusion that Brick had acted improperly. He argued that the three-judge district court allowed Brick's inspection of documents and that, although the 1967 search of respondents' house by state officers was unconstitutional, Brick's inspection of the fruits of that search was not a separate illegal act.

Judge Wilkey agreed that further proceedings should be held with respect to the claim of dissemination, but he suggested that in light of *Paul* v. *Davis*, 424 U.S. 693, respondents would be unable to establish any constitutional injury stemming from dissemination of private materials (Pet. App. 54a, 101a–114a).

Judge Danaher, writing for himself and Judges Tamm, MacKinnon and Robb, argued that principles

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of official immunity require the dismissal of the complaint in its entirety, without regard to the scope of immunity under the Speech or Debate Clause (Pet. App. 117a–130a).[15]

SUMMARY OF ARGUMENT

I

A. The central question in any case involving the Speech or Debate Clause "is whether the actions of the petitioners fall within the 'sphere of legitimate legislative activity.'" *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 501. The court of appeals unanimously concluded that Brick's activities here were part of a legitimate legislative investigation. Accordingly, the question that must be resolved is whether petitioners may be held to answer for any mistakes Brick may have made.

B. "[O]nce it is determined that Members [of Congress] are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference." *Servicemen's Fund, supra,* 421 U.S. at 503. The Clause precludes judicial inquiry even into conduct that would be illegal or unconstitutional if performed by private persons. This immunity is necessary not only to guard legislative independence against encroachments by other branches of the government, but also to ensure that Members and their

[15] Although the judges who joined this opinion also joined Judge Wilkey's opinion, the two opinions appear to call for different dispositions of the "dissemination" claim: Judge Wilkey would remand for further proceedings, and Judge Danaher would order the entry of summary judgment for petitioners.

aides are not diverted from their duties by the need to defend against suits brought by the many persons who might be aggrieved by legislative action.

The court of appeals thought that these principles of immunity are inapplicable where the legislative conduct arguably violates the Fourth Amendment. It believed that the use of unconstitutional means is not essential to legislating. But although it should not be necessary to use unlawful means to achieve legitimate objectives, it does not follow that a claim of unlawful conduct lifts the legislative immunity.

Legislative immunity from suit is of assistance only when a Member of Congress or a legislative aide is alleged to have engaged in conduct that would be actionable if engaged in by a private citizen. An immunity that would protect only when no wrong was alleged to have been committed would be no immunity at all. If a colorable allegation of wrongdoing subjects Members of Congress to discovery and trial, then they must submit to the sort of questioning, and endure the travail and disruption, that the Speech or Debate Clause was intended to prevent. The premise of immunity is that it is better to leave some wrongs unredressed than to subject conscientious legislators to time-consuming judicial proceedings and interference with the legislative process. In order to achieve this objective the immunity must apply in cases where questionable or incorrect judgment is alleged.

The rule should be the same for conduct alleged to violate the Fourth Amendment as it is for conduct

alleged to be improper or unlawful in some other way. In *Servicemen's Fund* the Court held that an allegation that a subpoena violated the First Amendment did not overcome the constitutional immunity of Members of Congress. It would have made no difference if the subjects of the subpoena had alleged that it violated the Fourth Amendment because it was unreasonable or overbroad. Violations of the Fourth Amendment are not essential to legislating, but neither are violations of the First Amendment or any other provision of the Constitution.

Gathering information in preparation for hearings, however, is an indispensable part of the legislative process. The immunity pertains to that process. It is inevitable that some mistakes will take place, and that some of these mistakes may be characterized as violations of the Fourth Amendment. But inquiry into allegations of error in matters that are part of the legislative process is precluded by the Speech or Debate Clause.

C. Even if the Court should disagree with these arguments, it still should not affirm the judgment of the court of appeals. Senator McClellan's only role in the events that have become the focus of this suit was as Chairman of the Subcommittee that authorized the investigation. Senator McClellan engaged in no extra-legislative conduct. Even if he had explicitly instructed investigator Brick to engage in conduct that violated the Fourth Amendment rights of respondents, he still would not be answerable for doing so. *Kilbourn* v. *Thompson,* 103 U.S. 168.

Moreover, no evidence in the record connects Senator McClellan, Adlerman, or O'Donnell to any decision made by Brick in the course of the investigation. Because the Speech or Debate Clause bars vicarious liability, the action must be dismissed with respect to these three petitioners even if it may continue with respect to Brick.

Brick, in turn, may not be held vicariously liable for any errors Ratliff may have committed in not obtaining the permission of the three-judge district court to allow Brick to inspect the documents seized from respondents. Ratliff, not Brick, was the custodian of the documents. The "safekeeping" order imposed no duties on Brick, and the question whether Ratliff should have obtained the permission of the court—a question that evenly divided the ten judges of the court of appeals—therefore has no bearing on Brick's liability.

Finally, liability of Brick may not properly be founded on the fact that he returned to Washington with copies of documents that later were asserted to be irrelevant to the Subcommittee's inquiry. Brick was entitled to allow the Subcommittee to make its own decision concerning relevance. He simply took to Congress all of the copies that were handed to him; the selection was performed by Ratliff and other state officials. Brick may have acted improvidently and incorrectly in not handing some of the copies back to state officials, but the Speech or Debate Clause does not permit inquiry into these matters. "The very na-

ture of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result." *Servicemen's Fund, supra,* 421 U.S. at 509.

II

Respondents alleged that some of the documents may have been disseminated to the Internal Revenue Service. The court of appeals thought that such dissemination would be unprotected by the Speech or Debate Clause, and it purported to "affirm" the order of the district court requiring further proceedings on the claim of dissemination. There was no such order to affirm. The issue was injected into the case in the court of appeals. Rather than affirming the judgment, the court of appeals should have allowed respondents to amend their complaint, provided that an amendment at this late date would be permitted by the statute of limitations.

In any event, the allegation of dissemination does not state a claim that survives scrutiny under the Speech or Debate Clause. Members of Congress should not be required to submit to discovery to enable plaintiffs to find out whether they have been injured at all, yet that is what the court of appeals ordered here. Respondents have alleged no more than that some documents *may* have been disseminated—and that contention is made in the face of evidence that all copies of their documents were returned to

them a year before the Subcommittee began providing information to the Internal Revenue Service.

What is more, any dissemination to the Internal Revenue Service would be privileged. Unlike public dissemination—which this Court held in *Doe* v. *McMillan,* 412 U.S. 306, not to be automatically entitled to the protection of the Clause—distribution within the government serves important governmental purposes. Provision of information to law enforcement agencies should be encouraged, and it undoubtedly is within the authority of legislative officials, as it is within the authority of all executive officers of the United States.

ARGUMENT

I

PETITIONERS ARE IMMUNE FROM LIABILITY FOR ERRORS IN THE CONDUCT OF AN INVESTIGATION LEADING TO THE ISSUANCE OF A LEGISLATIVE SUBPOENA

An equally divided court of appeals has required a Senator and one of his aides to undergo further judicial proceedings for their vicarious involvement in the activities of an investigator who is no longer living.[16] It has done so because, in the view of five judges, there was " 'more than merely colorable substance' " (Pet. App. 22a) to the argument that the investigator acted improperly, and because, in the view of all ten judges, the immunity of the Speech or

[16] See note 10, *supra.*

Debate Clause dissolves when a private party can establish "more than merely colorable substance" to an assertion that activities related to the legislative process have been conducted improperly (*id.* at 18a–20a, 55a n. 3).

The court of appeals' approach would seriously erode the protection afforded by the Speech or Debate Clause and would subject Members of Congress to trial in many cases in which private persons claim to have been injured by legislators' actions. The court of appeals erred because it made the scope of Speech or Debate Clause immunity turn upon a resolution of the merits of the allegation of misconduct.

A. PRELIMINARY INVESTIGATION LEADING TO THE ISSUANCE OF A SUBPOENA IS PART OF THE LEGISLATIVE PROCESS

The central question in any case involving the Speech or Debate Clause "is whether the actions of the petitioners fall within the 'sphere of legitimate legislative activity.'" *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 501. The court of appeals unanimously (and correctly) concluded that investigator Brick's activities in inspecting the documents at issue and transporting copies of some of them to Washington were part of a legitimate legislative inquiry by the Subcommittee into matters about which legislation could be had (Pet. App. 17a–18a, 55a n. 3).

This Court held in *Dombrowski* v. *Eastland*, 387 U.S. 82, that the Speech or Debate Clause immunized from liability the activities of a Senator and a legislative aide in "taking over" documents that had been illegally seized by state officials. This decision necessarily established that "taking over" the documents in preparation for committee deliberations was a legitimate legislative activity. Similarly, the Court held in *Doe* v. *McMillan*, 412 U.S. 306, 312–315, that Members of Congress and their investigative staff were absolutely immune from liability for conducting an investigation that uncovered information that arguably was defamatory and irrelevant to legislative purposes.

These cases demonstrate that "the power of inquiry is * * * an integral part of the legislative process." *Servicemen's Fund, supra*, 421 U.S. at 505. "The power to investigate and to do so through compulsory process plainly falls within" the class of legitimate legislative activities (*id.* at 504). Congress cannot legislate without gathering the information on which to base decisions, and the necessary information may be discovered by subpoena or by voluntary cooperation of persons outside Congress. "Investigations * * * are an established part of representative government." *Tenney* v. *Brandhove*, 341 U.S. 367, 377.

When persons apparently possessed of information appear to be unwilling to cooperate with Congress, it may often be necessary to conduct preliminary investigations leading to the issuance of subpoenas. That is what took place here; Brick's investigation led to the issuance of subpoenas, and respondents' refusal to comply with the subpoenas led to their citation for contempt of Congress.

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Congress' "power to investigate" (*Servicemen's Fund, supra,* 421 U.S. at 504) necessarily includes authority to discover the information needed to make intelligent decisions about whether and how to use subpoenas. See Pet. App. 151a. Congress sought information that appeared to bear on the causes and consequences of urban riots, a matter in which legislation could be had; moreover, "there was reason for investigative focus on [respondents]" (Pet. App. 18a). Investigator Brick therefore was within the bounds of legitimate legislative activities in seeking access to, and transporting to Washington, copies of materials seized from respondents by state officials.

B. THE SPEECH OR DEBATE CLAUSE FORBIDS FURTHER INQUIRY ONCE A COURT DETERMINES THAT A MEMBER OF CONGRESS OR HIS AIDE WAS ACTING WITHIN THE SCOPE OF LEGITIMATE LEGISLATIVE ACTIVITY

"[O]nce it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference." *Servicemen's Fund, supra,* 421 U.S. at 503. The Speech or Debate Clause, which this Court has always read "broadly to effectuate its purposes" (*id.* at 501), ensures to Congress freedom from executive or judicial oversight of the performance of legislative functions. See generally *United States* v. *Johnson,* 383 U.S. 169. Further judicial inquiry, after making a determination that the activity in question was within the legitimate legislative sphere, would amount to exactly the intrusion that the Clause forbids.

Because the Clause bars inquiry into the propriety of legislative conduct, "Congressmen and their aides are immune from liability for their actions within the 'legislative sphere,' * * * even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes." *Doe* v. *McMillan, supra,* 412 U.S. at 312–313. Courts may not look behind legislative action to determine its wisdom (*Servicemen's Fund, supra,* 421 U.S. at 509) or its motivation (*United States* v. *Johnson, supra,* 383 U.S. at 183). "The legislative privilege * * * is one manifestation of the 'practical security' for ensuring the independence of the legislature" (*id.* at 179), and that security would be largely dissipated if courts or the executive could call legislators to account for what they thought to be improvident, unwise, or ill-motivated performance of their legislative functions. See also *Tenney* v. *Brandhove, supra,* 341 U.S. at 377.

Not only the imperatives of legislative independence but also considerations of legislative efficiency support the determination in *Servicemen's Fund* that inquiry must be at an end once a court has found that the activities in question were within the legislative sphere. "[A] private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Servicemen's Fund, supra,* 421 U.S. at 503. The demands a suit places on legislative time and energy,

no less than concern about the consequences of a formal judicial order, counsel against permitting extended proceedings to inquire into the wisdom or propriety of legislative acts.

The court of appeals nevertheless held that such further proceedings are necessary in this case. Judge Leventhal stated that they are required for two reasons: first, because "[t]he employment of unlawful means to implement an otherwise proper legislative objective is simply not 'essential to legislating'" (Pet. App. 20a), and second, because the protections of the Speech or Debate Clause do not pertain to violations of the Fourth Amendment (*id.* at 19a n. 36, 22a). Neither of these explanations is sound.

1. The observation that it should not be "essential" to use unlawful means to carry out proper objectives is, of course, correct. But it does not follow that an allegation that such means were employed dissipates the immunity that would otherwise pertain to the activity. To the contrary, immunity from suit is of assistance only when a Member of Congress or a legislative aide is alleged to have engaged in activities that would be actionable if done by a private citizen. The court of appeals' conclusion, that an allegation that illegal or improper methods were employed in achieving a legitimate legislative objective lifts the protection of the Speech or Debate Clause, overlooks the principal purpose, and intended operation, of immunity, and it slights this Court's warning that the Clause applies to conduct that, "if performed in other

than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes." *Doe* v. *McMillan, supra,* 412 U.S. at 312–313. See also *United States* v. *Brewster,* 408 U.S. 501, 517.

An immunity that would protect only when no wrong was alleged to have been committed would be no immunity at all. If a colorable allegation of misconduct pierces the immunity, it might as well not exist.[17] If a colorable allegation of wrongdoing exposes a Member of Congress to discovery and trial, then Members must bear the travail, and the disruption of their legislative efforts, that, as this Court explained in *Servicemen's Fund,* the Constitution was designed to prevent. "The ease with which malice [or wrongdoing] can be charged leaves open the possibility that even the conscientious public servant will be dogged by suitors. The mere prospect of lawsuit may discourage even the most courageous official from the full and ardent discharge of altogether lawful duties, lest he become enmeshed in vexatious, though unfounded, litigation." *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution,* C.A.D.C. *en banc,* No. 74–1899, decided September 16, 1977, slip op. 1 (Robinson, J., concurring).

The premise of any grant of absolute immunity is that "it is better to leave unredressed some [misconduct] by officers acting out of malice or excess

[17] In the absence of a colorable allegation of misconduct, a case would be dismissed on the pleadings whether or not the defendants possessed any form of immunity.

zeal, than to subject the conscientious to the constant dread of retaliation. For every case of malicious governmental action potentially remedied by replacing [absolute immunity] with a qualified immunity, hundreds if not thousands of other actions in the public interest may be deferred or omitted." *Id.* at 10–11 (opinion of the court). If the goal of ensuring Congress the legislative independence contemplated by the Constitution is to be achieved, it cannot make a difference whether the plaintiff makes out a colorable claim that the Member of Congress or his aide erred.[18] The immunity must apply in cases of questionable judgment in order to serve its purpose: it must tolerate the possibility of misuse or abuse in order to protect conscientious legislators from vexatious private suits and from judicial or executive second-guessing.

The events giving rise to this suit took place in 1967. They have spawned several decisions by a three-judge district court in Kentucky, a decision by the Court of Appeals for the Sixth Circuit, convictions

[18] As Judge Learned Hand explained with respect to official immunity in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (C.A. 2), certiorari denied, 339 U.S. 949, "[t]he decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine."

for contempt of Congress (and the reversal of those convictions), and three decisions in this civil suit by the Court of Appeals for the District of Columbia Circuit. Senator McClellan has been enmeshed in this litigation for eight years, and under the disposition of the court of appeals there is no end in sight.

The proceeding will continue because ten judges divided evenly (ten years after the fact) over the question whether there was even "colorable" substance to the allegation that a solitary investigator for the Subcommittee had made errors of judgment in carrying out the concededly legitimate legislative task of gathering information that would help the Subcommittee decide whether to issue subpoenas. The investigator himself died several years ago, and he is no longer available to testify concerning his activities or motivations.[19] No judge has stated that the allegations of respondents' complaint, if proved, would entitle them to relief; respondents have obtained only the opinion of five judges that they have a "colorable" claim. If that is sufficient to subject a Senator to a decade of litigation, with more to come, then the Speech or Debate Clause has failed in its purpose.

2. The court of appeals concluded that, whatever may be the case for other misconduct, the

[19] Investigator Brick gave testimony in the contempt-of-Congress trial that bears on this litigation (A. 96–105), but, as Judge Leventhal recognized, this testimony "cannot bind the Subcommittee, its members, or other of its agents" (Pet. App. 53a). Brick's testimony itself is ambiguous (compare *id*, at 34a–37a and 53a with *id*. at 101a–114a).

Speech or Debate Clause does not shield Members and their aides from liability for violations of the Fourth Amendment. The court found support for this proposition in *Dombrowski* v. *Eastland, supra,* and this Court also, in *dicta* in cases following *Dombrowski,* has suggested that neither Members nor their aides are immune from liability or questioning for conduct that arguably violates the Fourth Amendment. See *Servicemen's Fund, supra,* 421 U.S. at 507–508, quoting from *Gravel* v. *United States,* 408 U.S. 606, 621.

But *Dombrowski* did not involve a situation in which a legislator or an aide was held liable for violating the Fourth Amendment in the course of carrying out otherwise legitimate legislative functions. The plaintiffs in *Dombrowski* made two allegations: first, that Senator Eastland and Subcommittee Counsel Sourwine had participated in a conspiracy with state officials to seize property in violation of the Fourth Amendment; second, that Senator Eastland and Sourwine had "taken over" the illegally-seized documents for congressional use. The Court held that proceedings concerning the allegations of "takeover" were barred by the Speech or Debate Clause. With respect to the allegations of conspiracy to seize the documents in the first instance, the Court required Sourwine (but not Senator Eastland) to submit to further proceedings.

The raid involved in *Dombrowski* was not an incidental violation of the Fourth Amendment in the course of an otherwise legitimate legislative activity.

Plaintiffs charged, rather, that Sourwine conspired with state officials to plan and carry out a raid to gain evidence for use in a state prosecution.[20] Planning and facilitation of a state prosecution are not functions of Congress. Because the state raids did not have a legislative objective, it made no difference to Sourwine's liability whether the conspiracy violated the Fourth Amendment or was actionable in some other way. It was not the case that immunity was dissipated by the nature of the wrong in which Sourwine was alleged to have taken part; rather, because the wrong was committed outside the "sphere of legitimate legislative activity," there was simply no Speech or Debate Clause immunity available at all.[21] See *Servicemen's Fund, supra,* 421 U.S. at 508.

[20] The state prosecution was subsequently enjoined. See *Dombrowski* v. *Pfister,* 380 U.S. 479, which also discusses the circumstances of the searches and seizures.

[21] Similarly, in *Kilbourn* v. *Thompson,* 103 U.S. 168, this Court held that the Sergeant-at-Arms of the House could be liable for imprisoning a recalcitrant witness. Although this case has been cited for the view that Speech or Debate Clause immunity does not apply to wrongful searches and seizures, the Court's holding was that Congress lacked a summary contempt power, and thus any attempt to imprison witnesses was part of the judicial rather than the legislative process. Because the Sergeant-at-Arms was attempting to exercise judicial powers, it made no difference whether the false imprisonment was a violation of the Fourth Amendment or (as the Court seemed to assume) simply a garden variety common law tort. See also *Tenney* v. *Brandhove, supra,* 341 U.S. at 378 ("[t]o find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive").

We therefore submit that no holding of this Court supports the position of the court of appeals. To the extent *dicta* in this Court's opinions support that decision, the *dicta* should not be considered binding. If, as *Servicemen's Fund* holds, courts cannot inquire to determine whether a legislative subpoena violates the First Amendment rights of those to whom it is addressed, they also should not be empowered to determine whether that same subpoena violates the Fourth Amendment rights of those same persons—as the subpoena could if it were, for example, overbroad or unreasonable. See, *e.g., Hale* v. *Henkel,* 201 U.S. 43.

If a court may not enjoin a congressional subpoena on Fourth Amendment grounds, it should not be authorized to award damages for Fourth Amendment violations during the course of congressional investigations. The Speech or Debate Clause protects legislators from liability even though their acts would be unconstitutional if done outside the legislative process (*Doe v. McMillan, supra,* 412 U.S. at 312–313), and we know of no principle that would logically permit the Speech or Debate Clause immunity to be overcome by a Fourth Amendment claim but not a First Amendment claim. Violations of the Fourth Amendment are not essential to legislating, but then neither are violations of the First Amendment or any other provision of the Constitution. Gathering information in preparation for hearings, however, is an indispensable part of the legislative process. The immunity pertains to that process, and the fact that errors in the con-

duct of legislative business may violate one constitutional provision rather than another should not be determinative.

The danger from allowing suits against Members of Congress based upon the Fourth Amendment is especially acute because that Amendment speaks in terms of "unreasonable" searches and seizures. In many cases, the Fourth Amendment simply authorizes a judicial review of the wisdom of executive action. Yet there are sound reasons, which we already have discussed, that counsel against subjecting legislators to the threat of personal liability for undertaking their legislative activities in a manner that a court subsequently may judge to have been "unreasonable."

It often is possible to cast ordinary arguments about error in Fourth Amendment terms. Usually violation of a valid judicial order is thought to be contempt of court, not a violation of the Fourth Amendment. The court of appeals, however, concluded that any violation of the three-judge court's "safekeeping" order would, if established, also be a violation of the Fourth Amendment.

Similarly, Judge Leventhal's opinion characterized the decision by Brick to return to Washington with apparently irrelevant documents as a violation of the Fourth Amendment, although Judge Wilkey concluded that the selection of documents was neither a search nor a seizure, let alone unreasonable.[22] Be-

[22] It is difficult to understand how the selection of irrelevant documents from among those provided to Brick by state officers can

cause of the elasticity of the Fourth Amendment, Judge Leventhal's approach to the Speech or Debate Clause could allow the exception to swallow the rule. Judge Leventhal would allow extensive judicial inquiry into the wisdom and reasonableness of decisions made or actions taken during the course of a congressional investigation—the very sort of inquiry that the Speech or Debate Clause was designed to prevent.

The holding of the court of appeals apparently is based on the belief that the Speech or Debate Clause should not be read to create immunity in the face of claims of unconstitutional action, else Members of Congress and their aides could violate the Constitution with impunity. In other words, the court made "the familiar argument that the broad protection granted by the Clause creates a potential for abuse. That is correct, and * * * we [have] noted that the risk of such abuse was 'the conscious choice of the Framers' buttressed and justified by history. * * * Our consistently broad construction of the Speech or Debate Clause rests on the belief that it must be so construed to provide the independence which is its central purpose." *Servicemen's Fund, supra,* 421 U.S. at 510–511. The Framers understood that it was necessary to choose between the potential evils of mistake and abuse of power, on the one hand, and the evils of executive and judicial interference with the conduct of legislative activities, on the other. Cognizant that the electorate's periodic review of legislators' actions would constitute an independent check on legislative incompetence or malfeasance, the Framers chose to tolerate congressional mistakes and abuses as the lesser evil. See *United States* v. *Brewster, supra,* 408 U.S. at 516.

be a violation of the Fourth Amendment. *United States* v. *Janis*, 428 U.S. 433, and *Burdeau* v. *McDowell*, 256 U.S. 465, establish that receipt by federal officials of documents unconstitutionally or improperly seized by state officials or private persons is not a separate constitutional wrong. The situation is the same, so far as the Fourth Amendment is concerned, whether or not the documents "taken over" are relevant to some further inquiry. The relevance of the documents might be important in a case based on a common law invasion of privacy theory, but it would not control any constitutional question.

C. ANY ERRORS IN THE PROCESS OF GATHERING INFORMATION FOR A CONGRESSIONAL COMMITTEE ARE AN INSUFFICIENT BASIS FOR THE IMPOSITION OF LIABILITY

If the Court agrees with the arguments we have made above, it should reverse the court of appeals' judgment without further ado. If the Court should disagree with some of these arguments, however, it could not affirm the court of appeals' judgment without considering the particular types of errors alleged to have occurred here. We submit that, even if some violations of the Fourth Amendment are outside the protection of the Clause, none of respondents' allegations establishes a sufficient basis for the imposition of liability.

1. Senator McClellan is immune for his role in authorizing the investigation

Senator McClellan has filed an affidavit (A. 47–50) stating that he participated in the events described by the complaint only as Chairman of the Subcommittee, authorizing the Subcommittee's investigation. Senator McClellan denied participating in any way in the planning or execution of the state raids (A. 49). Although respondents filed an answering affidavit (A. 55–56) stating "on information and belief" that Senator McClellan "joined in the conspiracy of the defendant Ratliff to force us out of Pikesville," respondents never stated what information to this effect they had in their possession.

The record therefore shows no more than that Senator McClellan authorized in general terms Brick's investigatory activity. That is not enough to overcome Senator McClellan's Speech or Debate Clause immunity. Even if Senator McClellan had explicitly instructed Brick to act as he did, he still would be protected by legislative immunity. See *Kilbourn* v. *Thompson,* 103 U.S. 168, which held that Members of Congress were immune for instructing the Sergeant-at-Arms of the House to make an arrest that this Court held was improper. See also *Doe* v. *McMillan, supra* (Members are immune for instructing the Public Printer to disseminate copies of a report, although the Printer might be liable for the actual distribution); *Powell* v. *McCormack,* 395 U.S. 486, 501–506 (Members are immune for excluding another

Member unconstitutionally, but employees of Congress who act in reliance on the resolution of exclusion may be liable).

Senator McClellan's role in authorizing Brick's investigation therefore cannot be the basis of liability. If, as *Kilbourn* and *Powell* establish, Members of Congress are not liable even for issuing explicit directions that other persons act in a way that violates the Constitution, surely they are not liable for simply not supervising congressional employees sufficiently to prevent misconduct.

2. Senator McClellan, Adlerman, and O'Donnell cannot be held vicariously responsible for Brick's acts

Kilbourn, Doe, and *Powell,* which we have discussed immediately above, necessarily establish that Members of Congress are not vicariously liable for illegal or unconstitutional acts committed by congressional employees. That principle should apply equally to the question whether one legislative employee may be vicariously liable for the acts of another.

Judge Leventhal acknowledged that "the record at present is silent on the involvement of defendants McClellan, Adlerman and O'Donnell" (Pet. App. 45a; see also *id.* at 22a n. 43). That should have led the court of appeals to direct the entry of judgment in favor of these three petitioners. The Speech or Debate Clause does not permit Members of Congress and their aides to be subjected to extensive discovery by

persons who seek to explore their case in search of its existence. Because the Clause protects Members and their aides against even the process of discovery,[23] plaintiffs must make out a sufficient case to survive a motion to dismiss on Speech or Debate Clause grounds; unsupported hope that something might turn up is not enough.

The court of appeals acknowledged that respondents have not shown how anyone other than Brick was involved in improper activities. This case therefore is controlled by *Dombrowski* v. *Eastland, supra.* This Court concluded that that case could not continue against Senator Eastland (although it could continue against Counsel Sourwine) because "[t]he record [did] not contain evidence of [the Senator's] involvement in any activity that could result in liability" (387 U.S. at 84). That is true here as well. A decade after the state raids took place, the record still does not contain any evidence that Senator McClellan, Adlerman, or O'Donnell participated in any way in the actions of Brick that have become the focus of this case (Pet. App. 101a). They are entitled to dismissal of the suit.

Judge Leventhal suggested (Pet. App. 45a) that petitioners could make "a renewed motion for summary judgment" on the ground that respondents have not adduced facts demonstrating the involvement of persons other than Brick in any improprieties. But

[23] See, *e.g.*, *Dombrowski* v. *Eastland*, *supra*, 387 U.S. at 85; *Powell* v. *McCormack*, *supra*, 395 U.S. at 503; *Servicemen's Fund*, *supra*, 421 U.S. at 503.

petitioners already have made one motion for summary judgment on Speech or Debate Clause grounds, and under *Dombrowski* that motion put in issue any question of involvement. Respondents were required to show, if they could, that they would be able to prove involvement. Respondents' affidavit contained only very general allegations, unsupported by specifics (A. 54–56), and it did not create any disputed issue of material fact on this question. Petitioners therefore were entitled to judgment in their favor without the necessity of further proceedings.[24]

[24] Respondents argue (Br. in Opp. 8–9) that this contention was not "pleaded" in the district court and is not subsumed in the questions presented. Respondents are incorrect on both counts.

Petitioners' motion to dismiss raised the argument that the Speech or Debate Clause afforded absolute immunity (A. 45–46); if respondents desired to controvert the allegations of Senator McClellan's affidavit (A. 47–50), they were required to do so then. The motion to dismiss, which was stated in general terms, was sufficient to raise the arguments we now present. Moreover, the court of appeals explicitly considered the consequences of respondents' failure to connect Senator McClellan, Adlerman, and O'Donnell to Brick's improprieties; if the court of appeals had agreed with the arguments we made, it would have ordered the suit to be dismissed at least with respect to these three petitioners.

We also believe that this argument is fairly comprised within the first question presented (page 2, *supra*). That question is whether the Speech or Debate Clause precludes liability for the investigative activities that took place here, and although the argument made in this portion of the brief pertains to only three of the four petitioners, it is squarely based upon the Speech or Debate Clause. We so interpreted the question at the time we wrote the petition, and the petition made this argument (Pet. 16–17), thereby alerting the Court that we believed that this issue was presented not only by the case but also by the questions we phrased.

3. Brick is not responsible for any violations of the three-judge court's "safekeeping" order or liable for the transportation of documents not relevant to the Subcommittee's investigation

Judge Leventhal offered two central arguments in support of his conclusion that respondents had made a "colorable" showing that Brick violated respondents' rights: (1) that Brick's inspection and receipt of copies of the documents seized by the State violated the three-judge court's order appointing Ratliff as custodian for the documents, and (2) that Brick transported to Washington copies of documents that proved to be immaterial to the legislative inquiry.[25] We discuss these arguments in order. In our view, neither would justify an award of damages even against Brick.[26]

[25] Judge Leventhal also relied on the fact that the documents had been seized illegally by the state officials (see Pet. App. 28a and note 14, *supra*), although it is difficult to discern whether this feature of the case contributed to Judge Leventhal's conclusion that respondents had made out a colorable showing of wrongdoing by Brick. There was no impropriety in the mere receipt of documents illegally seized by third parties. *United States* v. *Janis*, 428 U.S. 433. See also *Burdeau* v. *McDowell*, 256 U.S. 465 (receipt and use by public officials of documents wrongfully seized by private persons does not amount to a separate Fourth Amendment "seizure"). The fact that illegally-seized documents were "taken over" by Brick for use by Congress would not violate any rights of respondents, and even if it did violate their rights the Speech or Debate Clause would provide absolute immunity. See *Dombrowski* v. *Eastland*, *supra* (Member of Congress and his aide are absolutely immune for their roles in "takeover" of illegally-seized documents).

[26] Our discussion assumes that the claim for relief against Brick survives his death and has not abated. But see note 10, *supra*.

a. Requiring Brick to answer for any violations of the "safekeeping" order would be yet another form of vicarious liability, inconsistent with the purposes of the Speech or Debate Clause. The "safekeeping" order names Ratliff as the custodian of the documents (A. 78). It imposes no duties on Brick.[27] Respondents have not alleged or offered to introduce evidence to show that Brick was aware that the actions of Ratliff violated the order. Indeed, it is undisputed that Ratliff himself believed that he had authority to act as he did (Pet. App. 63a), and it was stipulated that Ratliff voluntarily furnished the copies to Brick (A. 20; see also A. 97, 100–101, 102).

[27] Under Fed. R. Civ. P. 65(d), Brick would be "bound" by the order if he were acting "in active concert or participation with [Ratliff after] receiv[ing] actual notice of the order by personal service or otherwise." Brick was not served with the order, and he did not receive actual notice of it until after he had received the copies of the documents (see A. 20, 103). The provisions of Rule 65(d) are "derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." *Regal Knitwear Co.* v. *National Labor Relations Board*, 324 U.S. 9, 14. But Brick was not Ratliff's agent or cat's paw. The question, rather—one on which ten judges were evenly divided—was whether Ratliff should have formally sought the permission of the three-judge court before showing the copies to Brick. The duty to seek permission, if there was one, was placed only on Ratliff, and the fact that Brick had actual notice of the order would not affect the fact that the onus to seek permission was on the custodian.

The copies were provided to Brick in his motel room by Thadeus Scott, a state detective, and the documents to be copied were selected by Ratliff and Scott (A. 20, 97). Brick played no role in the selection of these copies (A. 97, 100–101; Pet. App. 26a n. 49, 106a), nor did he take any original document. Brick did not learn of the "safekeeping" order until after he had received the copies furnished by Ratliff and Scott (A. 20, 103). Although Brick later examined some original documents in Ratliff's custody, he did not take any of these originals or copy them (A. 20, 98, 104). Under these circumstances Brick cannot be held responsible, consistent with the Speech or Debate Clause, for the fact that Ratliff did not obtain any authorization that may have been required.[28]

b. Judge Leventhal concluded that Brick would be liable for selection and transportation of documents that were not pertinent to the Subcommittee's inquiry (Pet. App. 34a–39a).[29] We submit, to the contrary, that liability on account of the selection and transportation of irrelevant documents is inconsistent with *Doe* and *Servicemen's Fund.*

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[28] We do not suggest that Ratliff in fact did violate any duties that the three-judge district court imposed on him as custodian. See the opinion of Judge Wilkey at Pet. App. 59a–80a. Our contention is merely that, even if Ratliff erred, his errors cannot be attributed to Brick.

[29] As Judge Wilkey pointed out, a single allegedly irrelevant document has become the focus of this case, and even that document was destroyed by respondents some time ago (Pet. App. 106a n. 108).

Investigation requires the exercise of judgment. An investigator must evaluate the purposes of the congressional inquiry, assess the directions in which the inquiry might develop after Congress acquires additional information, and then apply his best judgment to the material available to him for selection. An investigator must be aware that seemingly irrelevant documents might contain clues to the location or content of other documents that would be more apparently pertinent. Whether he selects or discards a particular document depends on his consideration of these and other factors.

"The very nature of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result." *Servicemen's Fund, supra,* 421 U.S. at 509. It is inevitable that on occasion some investigators will exercise their judgment unwisely. But if every error could lead to liability in damages, the process of investigation would become unacceptably risky. Investigators (and Members of Congress) would be presented with a dilemma: should they acquire a particular document and run the risk of liability if it should turn out to be irrelevant, and, indeed, run the risk of trial if it should be even arguably irrelevant; or should they discard the document and run the risk that valuable information would not come to the attention of Congress?

The Speech or Debate Clause was intended to prevent exposing the legislative process to this dilemma. It is too easy to allege irrelevance; suits and threats of suits could dissuade even the most hardy investigators and Members of Congress from the proper discharge of their duties. Investigators should be able to accept documents tendered to them and to allow Congress to make the decision whether the documents are relevant.[30] They should not be required to make that decision prematurely.

Once it has been determined—as it has been here—that the actions for which a legislator or his aides

[30] Judge Leventhal's opinion emphasized that Brick knew at the time he took the copies that some of the documents were irrelevant to the congressional inquiry (Pet. App. 34a–37a). It is not clear from the portions of the testimony at respondents' trial for contempt of Congress on which Judge Leventhal relies that Brick knew *at the time* that the documents were irrelevant (A. 96–105); Judge Wilkey argued that the documents might well have been relevant to a legitimate inquiry and that Brick was entitled to afford the Subcommittee an opportunity to judge whether they were relevant (*id.* at 105a–114a). But however that may be, reliance on the state of mind of a Member of Congress or one of his aides in carrying out a legislative function is impermissible. This Court has held many times that the courts may not inquire into the motives behind particular acts. See, *e.g.*, *Servicemen's Fund*, *supra*, 421 U.S. at 508–509 ("[i]f the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it"); *United States* v. *Johnson*, *supra*, 383 U.S. at 180, 183. Cf. *Tenney* v. *Brandhove*, *supra*, 341 U.S. at 377–378. Because inquiry into motive is inconsistent with the protections of the Clause, the acts of Brick—who simply returned to Washington with documents that were selected, copied and offered to him by state officials (A. 20, 97, 100–101, 102; Pet. App. 26a n. 49, 62a, 101a n. 94, 106a)—must be treated as no worse than honest mistakes if indeed they were mistakes at all.

are being questioned were taken during the course of a legitimate investigation with respect to matters on which legislation could be had, it should not matter that hindsight may show that Congress or its agents erred in pursuing its objective. In *Doe*, for example, the Court held that an investigator was immune despite a contention that he obtained private, irrelevant, and defamatory material later published by Congress (412 U.S. at 312). There, as here, the courts were forbidden to inquire into the propriety of that choice, for "[t]he wisdom of congressional approach or methodology is not open to judicial veto." *Servicemen's Fund, supra,* 421 U.S. at 509.

II

THE COURT OF APPEALS SHOULD NOT HAVE REMANDED FOR FURTHER PROCEEDINGS WITH RESPECT TO THE ALLEGATION THAT DOCUMENTS MAY HAVE BEEN SHOWN TO THE INTERNAL REVENUE SERVICE

In 1974—six years after all copies of the documents taken by Brick had been returned to respondents, and five and a half years after they had commenced this suit—respondents filed in the court of appeals two affidavits (A. 57–75) calling attention to the fact that in 1969 the Subcommittee began to make certain information in its files available to agents of the Internal Revenue Service. The court of appeals held that this allegation established a claim of dissemination of information outside the halls of Congress; it also held that the Speech or Debate Clause

does not pertain to such dissemination; and it purported to "affirm" the portion of the district court's order dealing with dissemination (Pet. App. 13a–16a, 44a, 54a, 213a). This decision, which could needlessly prolong this litigation and continue to subject Senator McClellan to the sort of "questioning" the Speech or Debate Clause prohibits, is wrong for several reasons.

A. There was no pertinent order of the district court for the court of appeals to affirm. Respondents' complaint does not allege that private documents were disseminated to the Internal Revenue Service.[31] The injection of the "dissemination" theory into the case in the court of appeals falls short of an amendment of the complaint; that theory has never formally been made a part of respondents' case.

The district court had no occasion to, and therefore did not, pass on the sufficiency of a claim of dissemina-

[31] The amended complaint alleged that Brick exhibited the documents "to persons whose names are unknown to the plaintiffs, to the damage and embarrassment of the plaintiffs" (A. 31–32). This allegation does not appear to encompass dissemination by the Subcommittee within the government. Moreover, Senator McClellan filed an affidavit recalling Brick's uncontroverted testimony in respondents' trial for contempt of Congress that the documents were maintained in a separate file under lock and key, and that they were disseminated to no one (A. 50, 97–98). Respondents' affidavit did not state any fact to the contrary; it merely alleged that the Subcommittee had disseminated information in its files to the Internal Revenue Service. Consequently, even if this allegation of the complaint could be construed as raising the question of dissemination outside of Congress, petitioners would have been entitled to summary judgment because there was no disputed issue of material fact on the question of dissemination.

tion or the extent of legislative immunity with respect to such a claim. Accordingly, the court of appeals lacked authority to proceed as it did. This Court should vacate its judgment to relieve petitioners of any improper consequences of the court of appeals' judgment of "affirmance" and its remand to the district court for further proceedings on the issue of dissemination.[32]

B. None of the allegations in respondents' 1974 affidavits makes out even a colorable claim on which relief may be granted.

1. Respondents' affidavits state that the exchange of documents between the Subcommittee and the Internal Revenue Service commenced in August 1969 (A. 57–58). But it appears to be undisputed that Brick returned all of the copies of respondents' documents in the Subcommittee's possession to state officials on August 14, 1968, more than a year before the exchange of information began (see Pet. App. 8a n. 13, 9a n. 15, 14a n. 25, 31a n. 59; see also A. 98). It is therefore difficult to see what—other than a fishing expedition by respondents—could be the purpose of further proceedings on remand.[33]

[32] If respondents desire to raise a claim of unlawful dissemination, they should start afresh in the district court by filing a new complaint or by amending the present one, provided that the pertinent statute of limitations would permit litigation so long after the events in question.

[33] Respondents speculate (A. 66–67) that documents may have been disseminated prior to the formal program of exchange, but Brick denied under oath that there had been dissemination (A. 97–98), and respondents offer no reason to doubt this testimony.

Nothing in the record tends to show that any of the documents was disclosed outside the halls of Congress, and there is no point in permitting discovery against legislative officials in the absence of such a showing. As Judge Leventhal has explained quite recently, "[w]hen the court is confronted with something as unusual as an attempt to sue Congressmen for participating in a 'public' distribution, the least plaintiffs must supply, before pressing any claim to discovery, is a concrete factual indication that there was indeed a 'public' distribution." *Doe* v. *McMillan,* C.A.D.C., No. 75–2016, decided July 29, 1977, rehearing denied, October 13, 1977, slip op. 3–4 (Leventhal, J., concurring in the denial of rehearing).

2. There has been no contention that the dissemination was "public." The common law tort of invasion of privacy pertains only to "public" dissemination, and the provision of private information to persons in confidence is not tortious.[34] See ALI, *Restatement (Second) of Torts* § 652D and comment *a* (1977). Moreover, under Sections 652F and 652G of the *Restatement,* all of the privileges applicable to defamation cases also apply to invasion-of-privacy cases. Sections 587 and 598 of the *Restatement* summarize the privileges for dissemination of information to law enforcement agencies, such as the Internal Revenue Service.[35] These privileges would bar any action by respondents.

[34] Under *Paul* v. *Davis*, 424 U.S. 693, even the public dissemination of private or defamatory information, without more, would not be a violation of the Constitution. See Pet. App. 102a–104a.

The scope of the common law right of action is consistent with the constitutional principles established by this Court. Under *United States* v. *Janis,* 428 U.S. 433, the Internal Revenue Service would be entitled to make use of any information turned over to it, despite the fact that it had been seized illegally by state officials. Employees of other branches or agencies of the federal government do not commit a tort by transmitting such information to employees of the Internal Revenue Service for official purposes.

C. Finally, even if the provision of information to the Internal Revenue Service would be tortious and unprivileged at common law, the Speech or Debate Clause would bar further inquiry. Provision of information to law enforcement agencies should be encouraged, and it undoubtedly is within the authority of legislative officials, as it is within the authority

[35] See the comments at pages 249 and 283 to these sections. There is a similar privilege for information provided in the course of judicial or legislative proceedings. See *Sachs* v. *Stecker*, 60 F. 2d 73, 75 (C.A. 2); *Brawer* v. *Horowitz*, 535 F. 2d 830, 836–837 (C.A. 3); Harper and James, *The Law of Torts* § 5.22 (1956). The privilege for disclosure to law enforcement agencies is necessary to encourage provision of the information that may be essential to the initiation and successful prosecution of civil and criminal proceedings.

of other officers and employees of the United States.[36]

Dissemination of information to law enforcement agencies is an important and legitimate activity of any public official or employee. As the court of appeals below itself recently noted (*Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institution, supra,* slip op. 6–7 (opinion of Leventhal, J.)):

> The nation's welfare is dependent upon officials who are willing to speak forthrightly and disclose violations of the law and other activities contrary to the public interest. Their voices will be stilled if they perceive or fear that the

[36] The court of appeals' reliance on *Doe* v. *McMillan*, 412 U.S. 306, for the principle that all dissemination outside the halls of Congress is unprotected by the Clause, is erroneous. That case involved a claim of *public* dissemination; in the present case, by contrast, there is no assertion that the documents were distributed outside the government. In *Doe* the information had been disseminated outside of Congress to the Public Printer, an executive officer, yet the Court did not conclude that this overcame the immunity conferred by the Speech or Debate Clause. The Court held only that public dissemination might be unprivileged, and then only if the public dissemination were unsupported by legitimate legislative needs.

In its decision on remand in *Doe*, the court of appeals held that the distribution of the information in question to numerous federal agencies and private persons with standing orders for legislative materials served a legitimate legislative function and that the distribution therefore was protected by the Speech or Debate Clause. See *Doe* v. *McMillan*, C.A.D.C., No. 75–2016, decided July 29, 1977, slip op. 7 ("the [Supreme] Court determined only that such [public] distribution was not *necessarily privileged*, and not that it was *per se* unprivileged") (footnote omitted, emphasis in original).

> person involved has the resources or disposition to defend with all affirmative tactics.

Those words, written in a case dealing with immunity for executive officials, are no less pertinent here. The Speech or Debate Clause precludes inquiry into respondents' allegation that information pertaining to them was made available to the Internal Revenue Service.[37]

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it subjects petitioners to further proceedings in the district court.

Respectfully submitted.

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NOVEMBER 1977.

[37] Judge Danaher argued (Pet. App. 117a–130a) that general principles of official immunity shield petitioners from liability for their conduct in this case. Our argument has been based upon the Speech or Debate Clause rather than upon principles of official immunity. We agree with Judge Danaher, however, that principles of official immunity should apply to legislators and their aides, and that these principles prevent the imposition of liability in this case. See our brief in *Butz* v. *Economou*, No. 76–709, argued November 7, 1977. If the Court should disagree with our arguments about the scope of Speech or Debate Clause immunity, it might be appropriate to remand this case to the court of appeals for any further consideration that may be warranted by this Court's decision in *Economou*. (We have furnished a copy of our brief in *Economou* to counsel for respondents.)

* The Solicitor General is disqualified in this case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1621

SENATOR JOHN L. McCLELLAN, *et al.*,
Petitioners,

v.

ALAN McSURELY and MARGARET McSURELY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 76-1621

SENATOR JOHN L. McCLELLAN, et al.,
Petitioners,

v.

ALAN McSURELY and MARGARET McSURELY,
Respondents.

BRIEF FOR THE RESPONDENTS

PRELIMINARY STATEMENT

The case before the Court is but another step in the litigation, now more than 10 years old, which was triggered by an outrageous violation of the constitutional rights of a law-abiding and courageous young couple. Following that invasion of their rights, the McSurelys were subjected to criminal prosecutions by state and federal governments, which prosecutions were also found to be in violation of their constitutional rights. See, McSurely v. Ratliff, 282 F. Supp. 848 (E. D. Ky.,

1967) (state prosecution); United States v. McSurely, 473 F. 2d 1178 (D.C. Cir., 1972) (federal prosecution). 1/

It took three stays by this Court (389 U.S. 949 [1967]; 390 U.S. 412 [1968]; 390 U.S. 914 [1968]), and ultimately District and Sixth Circuit decisions before the McSurelys could even obtain the return of papers and documents which had been unlawfully seized from them. See, McSurely v. Ratliff, 398 F. 2d 817 (6th Cir., 1968).

The issue now before the Court emerges out of the efforts of this husband and wife, who have suffered serious actual damages, to vindictate their constitutional rights by a civil action against those who violated them.

In this litigation, the McSurelys are faced with a claim that the federal legislative officials who violated their rights are above the law and not accountable to the courts because of a broad and extreme claim of legislative immunity which is comparable to the claims of executive immunity asserted and rejected in United States v. United States District Court, 407 U.S. 297 (1972), and United States v. Nixon, 418 U.S. 683 (1974).

As of this date the issues in this case have generated the following opinions of the Court of Appeals for the District of Columbia Circuit: McSurely v. McClellan, 426 F. 2d 664 (1970) (Pet. App. 19la); 521 F. 2d 1024 (1975) (Pet. App. 13la); 553 F. 2d 1277 (1976) (Pet. App. la).

In the face of an egregious denial of constitutional rights, the factual presentation in petitioners'

1/ The long saga of this case has been told in a series of articles in The New Yorker published in November, 1975, since republished as a portion of Richard Harris's FREEDOM SPENT (Little, Brown and Company, Boston, 1976).

brief is so distorted as to require a detailed counter-statement of the case by respondents.

ADDITIONAL CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

COUNTER-STATEMENT OF THE CASE

The initial action against the McSurelys and the litigation which halted the Kentucky prosecution

On August 11, 1967, the respondents, Alan and Margaret McSurely, were the object of an unconstitutional search and seizure by Kentucky prosecutive officials operating under an unconstitutional law. The search and seizure group of some 14 men was led by Thomas Ratliff, the non-federal defendant herein. 2/ The materials which were seized consisted of a massive quantity of books, records and documents, many of which were of a plainly personal nature. 3/

The seizure

> "included the personal clothing of Mrs. McSurely, boxes of office supplies, cancelled checks, unused checkbooks, college examination and review notes, the McSurelys' personal love letters, and their marriage certificate.

2/ Mr. Ratliff filed an Answer but has made no independent motion to dismiss or for summary judgment, nor is he party to the motion made by the federal defendants.

3/ Some idea of the massiveness and oppressiveness of the seizure can be gleaned from the inventory (A. 79-92) (the Appendix prepared by the government, consisting of 149 pages in two separate volumes paginated sequentially, will be cited herein as "A." without volume reference).

> One box contained 104 copies of Handbill Literature, all of which was published by the Commonwealth of Kentucky. There were 564 loose books impounded, which included "Tricks and Training for Cats," several books of poetry, one of which was "Poetry and Prose" by William Cullen Bryant, and the "Washington Yellow Page Telephone Directory." In essence the McSurely home was ransacked and [they] were cleaned out of all their papers and books." United States v. McSurely, supra, 473 F. 2d at 1187-88, emphasis by court.

The background for this raid and seizure is set forth in the Amended and Supplemental Complaint, 4/ as follows:

4/ The case comes before the Court in the posture of a review of the denial of a motion to dismiss or, in the alternative, for summary judgment, which was supported by only one affidavit, that of Senator McClellan (A. 51). None of the other defendants filed affidavits. The McSurelys filed an affidavit in response to that of Senator McClellan (A. 54).

The sources of facts for this case at this state of the proceedings, in addition to the Amended and Supplemental Complaint, are the following:

- Affidavits of Senator McClellan and of the McSurelys, referred to above
- Stipulations entered into on December 5, 1967 (A. 19, A. 22)
- The entire Appendix in the criminal appeal in United States v. McSurely, which was made part of the record in this case (Pet. App. 6a, n. 7), some portions of which have been printed in the Appendix. Where reference is made in this brief

[Footnote continued on next page.]

Alan and Margaret McSurely settled in April of 1967 in Pikeville, Pike County, Kentucky, and became employed by the Southern Conference Education Fund (SCEF). The people who live in the area of Appalachia where Pike County is located are among the poorest in the nation, despite the fact that Pike County is the largest coal-producing county in the region. Pikeville, county seat of Pike County, is the headquarters of the National Independent Coal Operators Association (NICOA), which represents the interests of all the non-union coal mine owners in Eastern Kentucky. Defendant Ratliff has major coal mining interests of his own in Pike County and was instrumental in creating NICOA. (A. 27.)

The McSurelys began activity in Pike County, working with both black and white citizens to organize politically to improve their social, political, and economic conditions. They were involved in opposition to coal mine operators in general and to the non-union NICOA in particular. 5/ They started to "investigate the socio-eco-political

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[Footnote continued from previous page:]
to any portion not printed in the Appendix, the citation will be to "U.S. v. McSurely Trial Tr."

- Supplemental affidavits of the McSurelys, dated November 23 and December 2, 1974 (A. 57, A. 65)

- Jurisdictional statement in McSurely v. Ratliff, No. 1113, October Term, 1967.

5/ A key issue in the community was strip-mining. See offer of proof by Dan Jack Combs, Pikeville attorney (U.S. v. McSurely Trial Tr., 377).

milieu of Pike County, 'to inform the people of their rights,' and to help local citizens 'organize to overcome their problems.'" McSurely v. Ratliff, supra, 282 F. Supp at 850.

On the afternoon of August 11, 1967, Mr. Ratliff, acting under color of his office as Commonwealth Attorney for Pike County, met with Robert Holcomb, president of NICOA and the Pike County Chamber of Commerce; the County Sheriff; several members of the Chamber of Commerce; the County Fiscal Court; and others. At this meeting, it is alleged in the Complaint, Mr. Ratliff suggested that raids be made on the McSurely home as well as that of one Joseph Mulloy (then an organizer for the Appalachian Volunteers, a private non-profit corporation funded primarily by the U.S. Office of Economic Opportunity for the purpose of assisting the poor people in Eastern Kentucky, Virginia, and West Virginia). Mr. Ratliff also suggested that Mulloy and Alan McSurely be arrested and their books, documents, and other records be seized. Later the same afternoon, closed hearings were held in the Pike County Court House, as a result of which, arrest and search warrants were issued with respect to Mulloy and Alan McSurely, based upon KRS 432.040, an anti-sedition statute. 6/ (A. 28.)

Later that evening, Mr. Ratliff led his raiding party into the home of the McSurelys. When he discovered that Margaret McSurely, then five

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6/ Eleven years earlier, the Supreme Court of Appeals of Kentucky had applied the principles of pre-emption to prosecutions for sedition under that statute. See, Braden v. Commonwealth, 291 S.W. 2d 843 (1956).

months pregnant, had once worked for the Student Non-Violent Coordinating Committee, he ordered a member of the raiding party to prepare an arrest warrant for her, too. After about two hours of rifling through personal belongings of the McSurelys, Mr. Ratliff at about 11 P. M. personally transported Alan and Margaret McSurely to the county jail and ordered the sheriff to seize practically every scrap of paper in their home. (A. 28-29, A. 79-92.)

Following their arrest, the McSurelys filed a complaint in the United States District Court for the Eastern District of Kentucky, challenging the constitutionality of the Kentucky sedition statute and requesting that the matter be heard by a three-judge court, pursuant to 28 U.S.C., §§2281-84. On September 14, 1967, a three-judge court entered an order, one judge dissenting, declaring the Kentucky sedition statute unconstitutional and permanently enjoining further prosecution of the McSurelys thereunder. (A. 77.)

The full opinion of the three-judge federal court, rendered a month after the September 14 order, included the following statement:

> "The conclusion is inescapable that the criminal prosecutions were instituted, at least in part, in order to stop [the McSurelys'] organizing activities in Pike County. That effect has been successful. Not only has there been a 'chilling effect' on freedom of speech referred to in Dombrowski, there has been, in fact, a freezing effect." 282 F. Supp. 848, 852-53.

The court in its order expressly directed the Commonwealth Attorney for Pike County, Ratliff, to continue to hold in "safe keeping" all material seized from the McSurelys until final disposition

of the case by appeal or otherwise (A. 78). No appeal was ever filed. Nevertheless, by reason of circumstances described below, it took another 14 months before the McSurelys obtained the return of their papers.

Inspection, transportation, and receipt by the federal defendants of personal documents of the McSurelys which were to have been held in safe keeping by a U.S. District Court order

The Amended Complaint alleges that at or about the time of the initial unconstitutional raid, the federal defendants, "acting both individually and jointly and/or in conspiracy with each other," and Mr. Ratliff, undertook a plan of action to continue the harassment of the McSurelys, and having among its objectives preventing them from continuing their work 7/ and obtaining their private papers, including personal correspondence with intimate friends "for the private purposes of the defendant McClellan in order to intimidate" the McSurelys and individuals with whom they may have been associated (A. 30-31).

Stipulations and testimony in prior proceedings establish that, directly after he made the raid and commenced his prosecution, Mr. Ratliff announced to the press that the material seized from the McSurelys would be made available to Congressional committees (A. 19). 7a/ Shortly thereafter, Mr.

7/ The McSurelys left Pike County on December 13, 1968, after their house was bombed. Thus, as they allege in the Complaint, "one of the primary aims of the original plan" was effected (A. 37).

7a/ Ratliff was then a candidate for Lt. Governor

[Footnote continued on next page.]

Ratliff was contacted by Lavern Duffy, assistant counsel to the McClellan Committee. In due course, on October 8, 1967, John Brick, an investigator for the Subcommittee, traveled to Pikeville (A.19).

There then developed an unsavory pattern of illicit cooperation between the Kentucky raiders and the staff of the Congressional Committee, fully detailed in the several opinions of the appellate courts which have dealt with this case. See, United States v. McSurely, supra, 473 F. 2d at 1181-83; McSurely v. McClellan, supra (Pet. App. 7a-8a). The Amended Complaint specifically alleges that the actions of Mr. Brick described below were undertaken "upon the instructions of the defendant McClellan and under the supervision of the defendants Adlerman and O'Donnell, but without the full knowledge or approval of the Senate Subcommittee or of the full Senate Committee" (A.31), and that these four federal defendants all acted in conspiracy with each other and with Mr. Ratliff.

The Complaint further alleges that despite the order of the District Court that the seized papers be held in safe keeping, Mr. Brick was given complete access to the papers and he in fact examined them (ibid.). This of course was done without the knowledge of the McSurelys (ibid.) or the approval of the court. 8/

[Footnote continued from previous page:
in the election scheduled to be held three months later in Kentucky.

8/ The statement in the government's brief, p. 4, n. 3, to the effect that Mr. Ratliff received

[Footnote continued on next page.]

Moreover, after a discussion among Messrs. Brick and Ratliff and the latter's assistant, 9/ there were brought to Mr. Brick xerox copies of 234 documents which had been selected from the mass of material seized from the McSurelys (A.31). 10/

[Footnote continued from previous page:]
permission from one of the three judges, the dissenter, to grant access to Mr. Brick of course emphasizes that the court gave no such permission. Besides, even the government's statement is simply not supported by the record. The reference to Judge Leventhal's opinion below (Pet. App. 29a, n. 54) establishes that, while permission from one judge was sought, there is no testimony that permission was granted. Even Judge Wilkey, dissenting, acknowledged that on this record one could not establish permission (Pet. App. 55a, n. 5); his argument was that permission was not necessary.

9/ Though Mr. Brick claimed not to have had any part in the selection of the documents (A.97), the record is quite clear that before the selection was made he had some discussion with Mr. Ratliff and two of his assistants, after which one of them left and returned later with copies of 234 documents (A.20).

10/ The list and title of each document appear at A.116-128. Though the Amended and Supplemental Complaint refers to 242 documents (A.31), it is clear that the correct number is 234.

Inspection of this list reveals that it includes an unusually high percentage of plainly personal items, mostly Margaret's, some Alan's. While in the reported opinions particular attention has been called to item 201, 11/ which is a letter addressed "Dearest Cucumber" and signed "Drew" [Pearson], there are a number of other items relating to Mr. Pearson. See a letter to Margaret addressed "Dear young lady" and signed "P" (item 140); one from Margaret to "Drew" (item 165); a single-page document giving addresses of the Drew Pearson office staff (item 217). There are also numerous other items which on their face are wholly personal. See, e.g., correspondence between Margaret McSurely and her mother or her parents (items 3, 8, 90, 212, 223, 224); a large number of letters to and from friends (items 1, 4, 5, 9, 11, 13, 16 24, 28, 31, 33, 34, 47, 53, 69, 71, 74, 75, 80, 93, 94, 111, 114, 115, 120, 128, 136, 138, 139, 168, 177, 178, 179, 182, 194, 200, 203, 206, 210, 215, 224, 227, 228); and the McSurelys' marriage and birth certificates (items 96, 121, 198).

At the trial of this case, both Mr. and Mrs. McSurely will be able to describe almost all of the items in the list and their testimony will establish the personal nature of the major part of the material.

The record is indisputable that Mr. Brick, at the time he inspected and took these documents, knew that "some of them were" not needed at all "for the performance of [his] duties for the United

11/ The numbers refer to those appearing in the list of documents re-printed (A. 116-128).

States Senate." 12/

12/ There are several suggestions in the government's brief that at the time of inspecting and taking the documents Mr. Brick really did not know that the material was not related to his duties but learned so later. See Gb38; 42, n. 30. This is flatly contradicted by Mr. Brick's own testimony at the trial in United States v. McSurely, as follows:

"Q And when they were handed to you, did you look at what it was that you were receiving?

A Yes.

Q You looked through that whole list?

A Yes.

Q Did you tell Mr. Dotson or any of the folk with whom you met there that there was some of that stuff that you didn't think that you needed?

A Yes.

Q Did you give it back to them?

A No.

Q Did you need that letter signed Dearest Cucumber or addressed, Dearest Cucumber?

***

The Witness: Was the question, did I need that letter?

Mr. Stavis: Yes. For the performance of your duties.

A No, sir.

Q As a matter of fact, in respect to the performance of your duties, you didn't need most of the items in that list, did you?

A Some of them." (A. 101)

Mr. Brick also testified that on the following day he had examined the court file, including the order of the court dated September 14, 1967 (A. 103-4). In spite of his reading of that order, he returned to Washington with those papers 13/ and he testified that he singled out one item from those records to show to Senator McClellan, namely, item 201, the letter addressed "Dearest Cucumber" and signed "Drew" (A. 98) and as to that particular item, the Senator gave Mr. Brick "different instructions ... he told me to put it in an envelope to be marked only to be opened by John Brick ... J.S. Adams [sic; should be "J.S. Adlerman"], General Counsel and Senator McClellan" (A. 100).

The implications of this personal correspondence between Margaret McSurely and Drew Pearson, and the relationships between Margaret McSurely and John Brick through his wife, and between Senator McClellan and Drew Pearson have not yet been fully developed. The McSurelys sought to, but upon vigorous objection by the government, were prevented from presenting these facts, except to a very minor extent, in their criminal trial, United States v. McSurely

13/ The first stipulation of December 5, 1967, seemed to suggest that Mr. Brick returned the papers to Kentucky officials after having screened them (A. 20, par. 9). This was corrected in the further stipulation made on the same day (A. 22, par. 2) and Mr. Brick's testimony at the criminal trial is clear that he took the documents to Washington (A. 97). Judge Leventhal further points out that the government concedes that Mr. Brick took the papers to Washington (Pet. App. 8a, n. 13).

(see Trial Tr., 422-34).

At the trial of this case Margaret McSurely will testify that after her papers were seized by Kentucky officials, and she realized that the Pearson correspondence may have been included in the items taken, she promptly communicated that fact to him. She first learned on December 5, 1967, at a court proceeding in Lexington, Kentucky, that Mr. Brick had copies of some of the records seized from her home (A. 22, par. 2; A. 140). There will also be proof that Mr. Pearson subsequently became aware of the fact that Senator McClellan had obtained copies of compromising correspondence between him and Mrs. McSurely. It will be further established that Drew Pearson and Senator McClellan were bitter enemies and that Mr. Pearson had published a number of columns highly critical of the Senator. Indeed, on August 10, 1967, the day before the illegal Kentucky seizure of some of Margaret McSurely's private papers, Mr. Pearson's widely-read column had strongly attacked Senator McClellan.14/

It will further be established that after Senator McClellan obtained copies of this Pearson

14/ Among exhibits which the McSurelys tried to use at their criminal trial were copies of two articles published in the Drew Pearson column in the Washington Post on August 29, 1966, and August 10, 1967, extremely critical of Senator McClellan.

See, United States v. McSurely Trial Transcript, 444; 1026-1930A.

correspondence and until the date of Mr. Pearson's death in 1968, the latter published nothing critical of Senator McClellan.

It will also be established that Margaret McSurely had for two and a half years, and during the period of her association with Mr. Pearson, been a patient of a Washington, D.C., psychiatrist whose secretary was Mrs. John Brick, wife of the defendant Brick. Mrs. McSurely's communications with her psychiatrist dealt extensively with her relationship with Mr. Pearson, and those communications were both oral and written. She also deposited with the psychiatrist, in order to assist in his treatment of her, a written summary of that relationship (A. 134).

The Amended Complaint alleges that after Mr. Brick returned to Washington with those items of private correspondence he showed them to various members of the Subcommittee staff and others, and made the McSurelys objects of ridicule, derision, and ribald comment (A. 31-32). 15/

The Senate Committee subpoena to Ratliff; the litigation in this Court and the Sixth Circuit which ordered return of their seized documents to the McSurelys

As noted above, the McSurelys were at the time wholly unaware of Mr. Brick's contacts with

15/ Many of the items of Margaret's were so personal that Alan McSurely had not even seen them before their return to the McSurelys on November 8, 1968 (A. 131-32; A. 138). Margaret had kept them in the back of her drawer (A. 137).

Mr. Ratliff and Brick's taking copies of their papers. On or about October 14, 1967, no appeal having been taken, the McSurelys demanded return of their seized papers, which had been held under the safe keeping order pending an appeal (Jurisdictional statement in McSurely v. Ratliff, No. 1113, October Term, 1967, p. 91a). Mr. Ratliff refused to effect a return without a court order, and while delaying the return, he notified the McClellan Committee of the demand (ibid.). Two days later, on October 16, by secret arrangement between Mr. Ratliff and the Committee staff, subpoenas duces tecum directed to Ratliff as well as to the McSurelys were issued (id. at 92a). The Amended Complaint alleges that the defendants McClellan, Adlerman, O'Donnell and Brick had these subpoenas prepared with the hope that Mr. Ratliff would quickly respond, without the possibility of interference by the McSurelys, thereby concealing the fact that the defendants had already inspected all the documents and had taken copies of many of them (A. 32). Since Mr. Brick had already taken McSurely documents to Washington, the only function of the subpoenas, at least as to that material, was to legitimize the secret taking of the materials. 16/

The subpoena was served on Mr. Ratliff on October 17. 16a/ On the morning of October 18, the

16/ There is no evidence that the McSurelys had any other material which was covered by the subpoena. Later on, Mr. Brick made it clear that the Subcommittee by its subpoena sought "in general" the very documents which he had taken (A. 129).

16a/ While the Amended Complaint alleges service on October 15 (A. 32, par. 21), the stipulation fixes the date as October 17.

McSurelys received their subpoenas, 17/ and on the same day filed their motion demanding return of their papers held by Ratliff and further seeking to enjoin his turning the papers over to the McClellan Committee in response to the subpoena served upon him. (Jurisdictional statement, supra, pp. 6a, 9a, 92a.)

In the course of litigation of that motion this Court granted three stays to prevent enforcement of the subpoenas until the District Court could at least hear the matter, 389 U.S. 949; this Court could determine whether it had jurisdiction, 390 U.S. 914; and finally until the Sixth Circuit could determine whether a stay should be continued while it determined the issues, 390 U.S. 412.

On July 29, 1968, the Sixth Circuit, having earlier continued the stay granted by this Court, ordered the documents returned to the McSurelys, with the following forthright statement:

> "The single issue now before this Court is whether the District Court erred in refusing to return to their owners documents which

17/ At the trial the McSurelys will testify that Mr. Brick arrived at their home at breakfast time. This was the first occasion that the McSurelys knew of his interest in their matter. After an exchange of pleasantries, references to Mrs. McSurely's acquaintanceship with Brick's wife, and discussion about the children, Mr. Brick was invited to have a cup of coffee, which he accepted. He then served the subpoenas, assuring the McSurelys that there was no necessity for them to come to Washington and that they would not have to respond to the subpoenas at all because Ratliff had all the papers and would be responding to his subpoena.

> were seized in aid of a prosecution under an unconstitutional statute, now that the time for appeal has expired. We conclude that this question must be answered in the affirmative. The business of the District Court in this case has been completed. The right of the Court to retain possession of the seized documents, which include no contraband, has expired." McSurely v. Ratliff, 398 F. 2d at 818.

The McSurelys finally had their papers returned on November 8, 1968, more than three months later, and then only at the direction of the District Court (Pet. App. 9a).

In the midst of the litigation in Kentucky, Mr. Brick for the first time revealed that he had taken copies of some of the McSurely papers, without benefit of, and prior to the issuance of, the subpoenas. In Lexington, Ky., on December 5, 1967, government counsel in Brick's presence entered into a stipulation which stated that Brick had received and then returned documents (A. 20, pars. 8 and 9) and then a further stipulation stating that "copies of some of the seized documents were made available to Mr. Brick prior to the issuance of the subpoenas" and were "in the possession of the McClellan Committee" (A. 22).

Not until after the conclusion of the litigation when the McSurelys had their documents returned on November 8, 1968, did Mr. Brick reveal the detailed list of what he had taken. 18/ Not until

18/ In his testimony at the criminal trial, Mr. Brick contended that he had actually returned the McSurely papers to Thadeus Scott of Ratliff's office on August 14, 1968 (A. 98). But Mr. Brick was present on November 8, 1968, when the

[Footnote continued on next page.]

the McSurelys prevailed in the Sixth Circuit seven months later as to the enforceability of the subpoena did Senator McClellan and his aides take steps to return what they had surreptitiously taken without any legal process and which they knew from the very beginning included items clearly unrelated to his legislative activity. 19/

Dissemination of materials outside of Congress

The Amended Complaint further alleges that Mr. Brick took the items above mentioned to

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[Footnote continued from previous page:] McSurelys finally received their papers and it was then that he revealed that he had in fact had possession of them when he reviewed with Alan McSurely the receipt that he had obtained from Mr. Scott for the return to him of the McSurely papers (A. 113).

19/ While the government argues that Mr. Brick should have been permitted to take what he thought was irrelevant, leaving it to the Committee to make the decision as to relevance (Gb41-2), there is no hint that during the entire period between the surreptitious taking and the return, any member of the Committee (as distinguished from staff), other than Senator McClellan, was told of Mr. Brick's taking the material. As Judge Leventhal pointed out, "[w]e are not aware that any claim of legislative need has been interposed for the love letter from Drew Pearson to Margaret McSurely" and "[t]here is no indication in the present record that legislative use was made of the letter in question" (Pet. App. 53a).

Washington, D.C., "where he exhibited them to persons whose names are unknown to the plaintiffs, to the damage and embarrassment of the plaintiffs" (A. 31-2).

This generalized allegation took on particularized meaning at the time this case was pending before the Court of Appeals as a result of a disclosure made in an unrelated Freedom of Information suit. Following that disclosure, the McSurelys filed supplemental affidavits dated November 25 and December 2, 1974 (A. 57, A. 65), which show that there was an exchange of data between the Senate Committee and the Internal Revenue Service beginning shortly after the decision of the Court of Appeals for the Sixth Circuit on July 29, 1968, and prior to the actual return of the documents to the McSurelys on November 8, 1968, and that Mr. O'Donnell personally participated therein and Senator McClellan was also directly involved in this process (A. 73).

Of particular significance are two facts: that the contact with the Internal Revenue Service was instigated by the McClellan Committee, and that this contact occurred in August of 1968 (ibid.). In time, the relationship clearly involved access to the Committee files for, in a memorandum of July 29, 1969, Mr. Manuel, staff member of the Committee, on behalf of the Committee on Government Operations, offered to the Internal Revenue Service Activist Organization Committee "the cooperation of the Committee and access to the Committee files." He described the method of filing used by the Committee and stated that "it is planned that IRS representatives will inspect those files as soon as possible" (A. 63). The day after the McSurelys, in response to a subpoena, appeared before the Senate Subcommittee and refused to

turn over their papers, Senator McClellan addressed a communication to the Secretary of the Treasury (A. 70), in which he sought information with respect to 22 organizations, of which nine are involved in documents which had been seized from the McSurelys (A. 66).

The coincidence of both the dates and the content of the material involved in the interchange between the Internal Revenue Service and the McClellan Committee strongly suggests that in fact the McSurely material was transmitted to the Internal Revenue Service by the McClellan Committee. 20/

20/ There is a pregnant footnote in the government's brief which may have been written in anticipation of future disclosures. At n. 8, p. 6. there is a reference to the stay issued by this Court on January 29, 1968. The careful statement that "the stay pertained only to the delivery of the original documents; it did not bar the delivery of photo-copies" suggests that there may well have been some photocopying during this period and delivery of such copies.

Disclaimers of the making of copies, as they appear in testimony and documents, seem extremely narrow. Thus, Mr. Brick testified as follows:

"Q Did you retain any of the documents thereafter or did you make any copy of any documents and retain them in your file?

"A I never made a single copy of any of those documents. I retained none. I have not now and the Subcommittee has none. All the documents were returned to Mr. Thadeus Scott. I have never used a Xerox machine on those documents, although it has been said here a number of times that I did. I did not." (A. 98; underscoring added.)

[Footnote continued on next page.]

The Senate Committee subpoenas to the McSurelys, and their federal criminal prosecutions

On November 8, 1968 - the very day that the McSurelys obtained the return of their papers - Mr. Brick served upon them new Senate Committee subpoenas (very similar to those served the preceding year), directing them to produce their papers before the Senate Committee (A. 33). The McSurelys appeared before the Committee and refused on constitutional grounds to comply with the subpoenas. They were prosecuted for, and convicted of, contempt of Congress. They were ultimately vindicated when their convictions were reversed on the ground that the subpoenas were based upon materials obtained in violation of the Fourth Amendment, United States v. McSurely, 473 F. 2d 1178 (1972). 21/ Judge Wilkey, who

[Footnote continued from previous page:]

Senator McClellan's affidavit of October 26, 1971, merely reiterates that Mr. Brick said the foregoing (A. 50); he makes no statement for himself. Nor did Mr. Brick, the Senator, or any other party disclaim that they permitted other persons to make copies and that copies were in the hands of persons other than the Subcommittee.

21/ Originally, the government contended that the subpoenas were based upon information in addition to that obtained from the examination of the seized material (A. 22, par. 1). But in the course of the criminal trial the government altered its position. As stated by the court in United States v. McSurely, 473 F. 2d at 1190,

[Footnote continued on next page.]

concurred in the result, argued that the materials sought by the subpoena were not pertinent to the Subcommittee's inquiry, 473 F. 2d at 1203-4. 22/

[Footnote continued from previous page:]

"Although it previously took a contrary position, the government has now conceded for purposes of this case that, but for said seizure by the state officials, the subcommittee and its members and agents would not have known of the existence of the documents and hence that the subpoenas directing their production before the subcommittee would not have been issued."

This concession by the government was not made until the McSurelys sought pretrial inspection of documents, pursuant to Rule 17(c), and pretrial depositions (A. 95), and by subpoena sought testimony from Senator McClellan.

22/ Though hardly relevant to the issues now before this Court, the government in its brief has chosen to distort the record and even amplify it beyond that which even Senator McClellan claimed.

Thus, the Court is told that there was a riot in Nashville, Tennessee, and "the subcommittee acquired information that appeared to link respondents to that disturbance" (Gb 4, n. 2). There is absolutely nothing in the record to support either such linkage or even a claim that the Subcommittee acquired information which established such linkage, nor does a reference in the footnote support such linkage. The reference is to a statement in Judge Leventhal's opinion that the McSurelys had stipulated that they attended a meeting of the Board of Directors of the Southern Conference Educational

[Footnote continued on next page.]

The history of this litigation

As explained by the lower court (Pet. App. 9a), the action for damages presently under consideration was originally filed in the District

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Fund (SCEF) between April 6 and 8, 1967 (A. 21). Reference to the minutes of the meeting which were attached to the stipulation (they appear at U. S. v. McSurely Trial Tr., 1033-36) shows that it was a meeting of the Board of the organization of which the McSurelys were staff members; that the meeting was held at the Methodist Board of Evangelism building; that it opened and concluded with prayer; that the group, including three clergymen, considered a wide range of business, from a proposed budget to the proposed sponsorship of a seminar in law enforcement relating to HEW guidelines for school desegregation. Mr. Stokely Carmichael, "who was in Nashville to speak at Vanderbilt," met with the Board to explain his position on the need for black power in politics and economics." The only action taken in respect to Mr. Carmichael was a resolution supporting his "right to dissent" (id. at 1035).

A description of the disorders that occurred in Nashville is found in Brooks v. Briley, 274 F. Supp. 538 542-46 (M. D. Tenn., 1967) (three-judge court), aff'd., 391 U. S. 361 (1968). Some claim was made that Mr. Carmichael contributed to the disturbances by a speech he made at Vanderbilt University but in all the testimony of City officials in that case, no mention was made of the McSurelys. The McSurelys in fact left Nashville directly after the SCEF Board meeting and were not even in the City when the disturbances occurred!

Court for the District of Columbia on March 4, 1969 - the same day that the McSurelys appeared before the Subcommittee. Later, the District Court issued an order staying all proceedings, to continue in effect until thirty days after final resolution of the criminal case against the McSurelys. On March 26, 1970, the Court of Appeals for the District of Columbia vacated the stay as overbroad, and remanded for further proceedings. McSurely v. McClellan, supra (Pet. App. 195a).

On August 30, 1971, after the criminal trial was had but before reversal of the convictions, the McSurelys were granted leave by the District Court to file an Amended and Supplemental Complaint, which was based partly on evidence developed at the criminal trial and which eliminated some and added other parties defendant. The four named federal defendants were Senator John L. McClellan, Jerome S. Adlerman, Donald F. O'Donnell, and John Brick, the latter three staff members of a Subcommittee of the Committee on Government Operations chaired by Senator McClellan. 23/

23/ Three of the defendants have since died: Mr. Brick on October 15, 1973; Mr. Adlerman on October 1, 1975; and Senator McClellan on or about November 28, 1977.

The issue of the survivability of the cause of action here at issue has not been adjudicated. It was raised sua sponte by the Court of Appeals and at the time both parties expressed the view that the cause of action survives. That court did not decide the issue and remanded it for determination by the District Court (Pet. App. 4a, 44a).

As to Messrs. Brick and Adlerman, there is pending in the District Court a motion to substitute

[Footnote continued on next page.]

Shortly thereafter, the federal defendants filed a motion to dismiss or for summary judgment (A. 45), which the District Court denied on June 12, 1973 (Pet. App. 215a). A motion for reconsideration or certification under 28 U.S.C., §1292(b), was denied on July 9, 1973 (Pet. App. 216a). 24/ An appeal to the Court of Appeals followed.

[Footnote continued from previous page:]
personal representatives. The government opposed the motion on the ground of alleged delay in making the motion, although the record is clear that the decedents' representatives never furnished or filed information which would have triggered a requirement that the McSurelys take steps to effect substitution (see, Rende v. Kay, 415 F. 2d 983 (App. D.C., 1969).

As to Senator McClellan, counsel for the respondents has been advised that the government will be presenting a motion for substitution some time within the month of January, 1978.

24/ In view of stays obtained by the defendants, there has been limited discovery. During the period of its consideration of the motion to dismiss (October, 1971, to June, 1973), the District Court stayed discovery. After the District Court vacated the stay on July 12, 1973, the McSurelys proceeded to depose Mr. O'Donnell on July 10 and Robert E. Dunne, a former employee of the Subcommittee, on August 3. At that time, both Messrs. Brick and Adlerman were already ill and though counsel for the McSurelys expressly demanded notification as to when they could be deposed, no such notice was given. They both died thereafter. No deposition was taken from Senator McClellan. Further discovery came to a halt after the federal defendants filed a notice of appeal on August 6, 1973.

The grounds upon which the federal defendants moved to dismiss or for summary judgment were based upon the Speech or Debate Clause (original motion, A.45; motion for reconsideration, A.148).

The decision below

In a decision since vacated, a majority of a panel of the Court of Appeals for the District of Columbia (Judges Wilkey and Danaher), with Judge Leventhal dissenting, granted summary judgment to the defendants except upon the question of distribution of materials to individuals or agencies outside of Congress. It also left for determination by the District Court the question whether the McSurelys made a claim that the defendants actively collaborated in the original Kentucky raid and, if so, whether there was sufficient evidence to merit a trial on that issue (Pet. App. 131a).

By order of the Court of Appeals, the panel decision was vacated. The case was then heard en banc (Pet. App. 5a) and the court entered these orders:

"(1) Reverses the District Court's failure to grant the motion of the federal defendants to dismiss that part of the complaint relating to the original taking of the McSurelys' books and papers by the Kentucky authorities.

(2) Reverses with directions to grant summary judgment to appellants [federal defendants] on those parts of the complaint that complain of the alleged use made of the documents within Congress, since such use is protected by the Speech or Debate clause.

(3) Affirms the District Court, with remand for further proceedings, on the claim as to alleged dissemination of some of the documents

outside of Congress.

(4) Affirms by an equally divided vote, the District Court's denial of summary judgment on the allegations concerning the action of subcommittee investigator Brick in inspecting the documents and transporting copies of some of them to Washington prior to issuance of a subcommittee subpoena." (Pet. App. 2a-3a.)

As summarized by the lower court, the activities alleged in the Amended Complaint are characterized as falling into seven categories:

"(1) The unlawful search and seizure of the McSurelys' books and papers by Kentucky authorities.

(2) The inspection by Brick of these unlawfully seized materials.

(3) The transport by Brick of copies of 234 documents to Washington.

(4) The inspection of some or all of these 234 copies by the staff of the Subcommittee.

(5) The use of the copies as the basis for issuance of subpoenas for some of the documents.

(6) The procurement of contempt of Congress citations against the plaintiffs by consciously withholding from the Senate the facts relating to the challenged subpoenas.

(7) The dissemination of some or all of the 234 copies obtained by Brick to persons or agencies outside of the Subcommittee - particularly the Internal Revenue Service." (Pet. App. 11a-12a.)

The claims upon which the Court of Appeals was divided included the charges against the federal defendants as they relate to the action of Subcommittee investigator Brick, in conspiracy

with the other defendants, in inspecting the McSurely documents in Kentucky and transporting some of them to Washington prior to the issuance of a subpoena.

In the two major opinions - those of Judges Leventhal and Wilkey - there is agreement upon the fundamental principle that the Speech or Debate Clause does not protect a committee investigator who in the course of preliminary investigative activity engages in a search and seizure in violation of the Fourth Amendment. See, Judge Leventhal's opinion (Pet. App. 19a-20a); Judge Wilkey's opinion (Pet. App. 55a, n. 3). The main issue upon which Judges Leventhal and Wilkey disagreed was whether the conduct of Mr. Brick and the other federal defendants constituted a Fourth Amendment violation. Judge Leventhal and his four colleagues emphasized that based on the pleadings and admitted proofs, which established more than merely "colorable substance" (Pet. App. 22a), Mr. Brick's conduct was that of an active wrongdoer and not that of a mere passive recipient of the product of another party's wrongdoing. Accordingly he held that the McSurelys were entitled to go to trial on their claim that there had been an independent violation of their Fourth Amendment rights by Mr. Brick and those who conspired with him (Pet. App. 25a). Moreover, Judge Leventhal viewed the existence of the safe keeping order of September 14, 1967, as "making all the difference in the world" (Pet. App. 46a) on the question whether Mr. Brick could be charged with a violation of the McSurelys' Fourth Amendment rights, because Mr. Brick took the papers after the court asserted custody over them and had already adjudicated that they had been seized under an unconstitutional statute. He emphasized that those

facts would distinguish this case from United States v. Calandra, 414 U.S. 338 (1974), even if the principles of that case were otherwise applicable to legislative committees.

Judge Wilkey, on the other hand, argued that as an extension of Calandra, a Congressional employee "commits no new Fourth Amendment wrong by examining and copying documents originally unlawfully seized" (Pet. App. 85a) and he read the safe keeping order of September 14, 1967, as not barring Mr. Brick from taking copies.

There was also disagreement between the two judges on another issue. Judge Leventhal was of the view that, independently of the Fourth Amendment violation, the selection and seizure of documents concededly irrelevant to a legislative inquiry were outside the protection of legislative immunity and could present a justiciable claim of violation of rights of privacy. On the record made in this case up to this point, he concluded that the McSurelys were at least entitled to a trial of their claims. Judge Wilkey disagreed, claiming that Mrs. McSurely's private correspondence was not "concededly irrelevant to legislative inquiry" (Pet. App. 108a), and in his view the privacy claim could not rise to a constitutional tort. He did not consider the matter from the point of view of pendent jurisdiction as referred to in Judge Leventhal's supplemental opinion (Pet. App. 53a).

Judge Danaher's opinion would have dismissed the entire Complaint. There does not appear in his opinion any detailed analysis of the limitations upon the Speech or Debate Clause because he relies on official immunity; moreover, his opinion appears to be based upon a misapprehension of the factual

foundations of the Complaint. 25/

Though Judge Danaher's opinion calls for the dismissal of the Complaint in its entirety, there is some confusion as to whether he and the judges who joined him agreed with that portion of Judge Wilkey's opinion (Pet. App. 54a) expressing accord with Judge Leventhal's statements with respect to "the alleged dissemination of the McSurely documents outside the legislative sphere." Judge Wilkey did say that he was joined in his opinion by Judge Danaher and the other judges who subscribed to the Danaher opinion. 26/

It should be noted that the McSurelys have not filed any cross-petition with respect to those portions of the decision below which dismissed the Complaint or granted summary judgment as to the federal defendants in respect to 1) the original taking of the McSurelys' papers by Kentucky authorities, and 2) the alleged use of the papers within Congress.

25/ Judge Danaher's opinion at no point mentions that the basis of the claims which remain triable under Judge Leventhal's opinion concern the inspecting and taking of private personal correspondence. His analysis of the case assumes that the entire thrust of the Complaint is the issuance of the subpoenas (Pet. App. 119a), which he appears to justify with the statement that "Chairman McClellan and the Subcommittee may well have concluded that the McSurelys would prove to be prime witnesses concerning the economic and social problems prevalent in Kentucky" (Pet. App. 124a).

26/ The government's brief acknowledges this confusion (Gb14, n. 15).

The Court will quickly observe that the government's brief before this Court does not support Judge Danaher's opinion except as it suggests (Gb49, n. 37) the possibility of remand if the government does not succeed on Speech or Debate grounds. Since the government does not discuss the issue, we will not do so either. We submit that in any event the principles which we develop in connection with the Speech or Debate Clause would be equally applicable to a legislative claim of official immunity.

Except for a minor reference in a footnote (Gb31, n. 22), the government does not appear to be supporting Judge Wilkey's main contention that no Fourth Amendment or privacy rights of the McSurelys' were violated.

The thrust of the government's brief is that the absolute immunity of the Speech or Debate Clause encompasses all the acts charged to the federal defendants and if the Court does not accept that contention, then it is claimed that each of the defendants is sought to be implicated only vicariously, which, it is argued, is impermissible under the Speech or Debate Clause.

In this brief we shall respond both to the arguments presented by Judge Wilkey (Point III) and those presented by the government in its brief.

SUMMARY OF ARGUMENT

I.

The government's argument essentially is that all conduct by a Member of Congress or a Congressional aide performed in the course of information-gathering activity is absolutely immune under the Speech or Debate Clause, regardless of violations of the Constitution, as long as it may be said that the conduct is related to a legitimate legislative investigation. This argument was rejected by all 10 judges below. On its face, the government's position is untenable because information gathering may, in addition to search and seizure, include a wide range of activities, including assaults, electronic surveillance, bribery, and other activites which plainly cannot be immunized. The flaw in the government's argument is its failure to recognize the fundamental distinction that this Court has consistently drawn between conduct which merely relates to the legislative process, which is not immunized, and conduct which is an integral part of the legislative process, which is immunized. Further, the government fails to note that the Speech or Debate Clause is operative in respect to speech and speech-type conduct; it is not operative in respect to physical action.

a) The Speech or Debate Clause emerged out of the struggle for Parliamentary independence in England and became part of the Constitution of the United States to assure the Separation of Powers and legislative independence. In English experience, though the Speech or Debate Clause performed its function of protecting Parliamentary independence, there was at the same time a long record

of abuse of the legislative privilege, which was not resolved until the English courts placed restrictions on legislative claims of privilege. In this country there has been, from the beginning, an awareness of the history of abuse of the privilege in England. Perversion of the Speech or Debate Clause has been avoided by the adoption of sharply delineated limitations so that the privilege would be applied to conduct which is "an integral part of the deliberative and communicative process" and would not be applied to conduct which merely "relates" to the legislative process. The fact that conduct is such that legislators normally engage therein does not immunize it under the Speech or Debate Clause. Conduct which is immunized includes voting, speaking on the floor or in committees, filing reports, issuing subpoenas - conduct which is at the heart of the legislative process. Contact with government agencies, assistance to constituents, and preparation for hearings are not legislative acts.

b) The delineation above set forth has been applied by this Court in a number of cases in which immunity has been asserted in respect to investigative activities of legislators. The Court in such cases has differentiated between the use of a subpoena, which is a legislative act, Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), and pre-subpoena information gathering, which is not a legislative act and not entitled to Speech or Debate immunity, Dombrowski v. Eastland, 387 U.S. 82 (1967).

c) In addition to the foregoing distinction, it is clear that the Speech or Debate Clause applies only to speech and speech-type conduct, such as voting. It does not apply to physical acts, such as assaults, arrests, searches and seizures. Except

under very closely limited circumstances involving the direct exercise of its contempt power or the disciplining of its own Members, it is not the business of legislators to arrest members of the citizenry or effect searches and seizures. They are simply not legislative acts.

In view of the vast expansion of the legislative establishment, the claim of the government in this case that legislators and members of their staffs are entitled to legislative immunity whenever they claim to be engaging in preliminary investigative activity on a matter as to which legislation could be had, would place a large number of people above the law. Indeed, the number of people for whom the privilege is being claimed is so large and the claim of privilege is so broad that the abuses of the privilege in England would pale by comparison to that which would follow here if the government's view were adopted.

This Court has recently rejected exaggerated claims of immunity made on behalf of the executive branch of the government, even though the claims were couched in terms of the needs of national security and were made only on behalf of the chief executive. It should similarly reject the broad and extreme claims of legislative privilege asserted here.

II.

The conduct sought to be immunized in this case does not even relate to the legislative process. On the record here, there is an admission that the taking of some of the private papers was not done for any legislative purpose. Under those circumstances, even if it were otherwise possible to consider some information-gathering activities

immune, certainly such activites, when they were admittedly not done for legislative purposes, would be outside the protection of the Speech or Debate Clause.

III.

a) The conduct of defendants as alleged in the pleadings amounted to a violation of the Fourth Amendment rights of the McSurelys. The fact that their papers were first illegally seized by state authorities does not mean that a subsequent taking of them by federal legislators and their staffs may not constitute a Fourth Amendment violation. Cases dealing with the non-application of the exclusionary rule in such circumstances are not instructive on the question whether any of the parties is liable in a damage action. The record here establishes active pursuit by the legislator and his employees of the previously-seized papers and in that situation a Fourth Amendment violation exists even if it were true that a mere passive receipt of previously-seized papers would not establish such liability.

Moreover, the materials were taken by the legislator and his employees and retained by them in the teeth of a federal court order of September 14, 1967, that, pending appeal, the papers be maintained in safe keeping by the state officials. The federal court when it made the safe keeping order had already determined that the statute under which the papers had been seized was unconstitutional and its order had been in response to litigation commenced by the McSurelys to obtain the return of their papers from those who had seized them unlawfully. Under the foregoing circumstances, a

taking of the papers by legislative employees from the safe-keeper must be viewed as an independent violation of the Fourth Amendment rights of the McSurelys.

b) Even if the Court were to hold that the conduct in this case did not violate the McSurelys' Fourth Amendment rights, their right to privacy was certainly violated by intrusion into their private affairs and by the taking of copies of their intimate and personal papers. Unlike Paul v. Davis, 424 U.S. 693 (1976), the denial of the right to privacy rises to the level of constitutional tort because the McSurely's property - copies of their intimate papers - was taken. If not, then the McSurelys on principles of pendent jurisdiction have a right to proceed upon a non-constitutional claim of violation of privacy rights.

IV.

a) Contrary to the arguments of the government, the Speech or Debate Clause does not create a general principle that legislators may not be held liable for the conduct of others. Immunity for the acts of agents of a legislator exists only when the directive act of the legislator is a legislative act, such as voting for a resolution, which is immunized by the Speech or Debate Clause. If the directive act is non-legislative in nature, as it was here, i.e., directing a pre-subpoena unlawful taking of copies of papers, then there is no principle which immunizes a legislator because he acted vicariously.

b) In any event, on the record in this case, the conduct for which liability is claimed against defendants McClellan, Adlerman and

O'Donnell is charged to them directly and not vicariously.

c) The government's contention that violation of the safe keeping order of September 14, 1967, may not be the basis for a claim against the defendant Brick is bottomed upon an incorrect view that the order was not binding on Brick. Even if it were true that the order was binding only on Ratliff, Brick would be vicariously liable and, as stated above, there is no rule that prevents vicarious responsibility of legislators and their staffs for conduct which does not constitute a legislative act. The pre-subpoena taking of the McSurely papers was not such an act.

The Speech or Debate Clause created no immunity for Brick to employ non-legislative acts to obtain irrelevant material on some theory that ultimately relevant material might turn up. The test of immunity is whether the conduct constitutes a legislative act. If it does not, there is no immunity - whether the conduct produced relevant or irrelevant material.

V.

None of the defendants is entitled to summary judgment. None of them has moved for summary judgment on the ground of absence of any genuine issue as to any material fact. The record indeed would not support such a motion. The government's claim in essence is that some of the defendants are entitled to summary judgment because the McSurelys have not in affidavits set forth the detailed basis of the proofs they would offer at trial. On this record, however, those defendants did not present affidavits which disputed well pleaded allegations in the Complaint and, under the

circumstances, the McSurelys were not called upon to furnish the detailed basis of their proofs. The government can find no support for its claim in Dombrowski v. Eastland, supra, because there, unlike here, the defendants did present extremely detailed affidavits disputing the allegations in the complaint.

VI.

The Court of Appeals properly ruled that upon remand the District Court should consider allegations with respect to the possible distribution of McSurely materials to the Internal Revenue Service. Contrary to the assertions of the government, the Amended Complaint encompasses claims as to such distribution. The Speech or Debate Clause provides no immunity for the dissemination of materials outside the halls of Congress. If there is any other kind of privilege of legislative officials to distribute material to an administrative agency, that would not include material illegally obtained. In any event, such a privilege would be a qualified one, subject to a trial to determine questions such as authority, relevance, etc. The Court of Appeals' remand, which included factual and legal questions, was proper.

ARGUMENT

I.

THE SPEECH OR DEBATE CLAUSE DOES NOT PROVIDE IMMUNITY FOR WRONGFUL OR UNLAWFUL CONDUCT BY LEGISLATORS AND THEIR AIDES WHERE SUCH CONDUCT MERELY "RELATES" TO LEGISLATIVE ACTIVITY AND IS NOT AN "INTEGRAL PART OF THE LEGISLATIVE PROCESS," NOR DOES IT PROVIDE IMMUNITY FOR DIRECT PHYSICAL ACTION WHICH INVADES THE RIGHTS OF THE CITIZEN. THE CONDUCT CHARGED TO THE FEDERAL DEFENDANTS HAS NO LEGISLATIVE IMMUNITY.

The government has postulated as its first position that the Speech or Debate Clause bars a suit against a Senator or his aides which charges unlawful conduct in the performance of information-gathering activity - as distinguished from the use of a subpoena - even if such activity would otherwise violate constitutional rights, as long as it may be said that the activity is related to a legitimate legislative investigation.

This position is developed in the following syllogism:

a) "Preliminary investigation leading to the issuance of a subpoena is part of the legislative process" (Heading, Gb20);

b) "The Speech or Debate Clause forbids further inquiry once a court determines that a Member of Congress or an aide was acting within the

scope of legitimate legislative activity" (Heading, Gb22) and that immunity obtains "even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes" (Gb23).

Q. E. D.: Information-gathering activity, even if it involves violations of the Fourth Amendment, is included within the immunity of the Speech or Debate Clause.

It might be well to point out that the government's position presented in its brief before this Court was rejected by all 10 judges below. None of them accepted the thesis that violations of the Fourth Amendment committed in the course of a search or seizure which was part of information-gathering activity, was immunized by the Speech or Debate Clause (see Judge Leventhal's opinion, Pet. App. 20a; Judge Wilkey's opinion, Pet. App. 55a, n. 3).

The implications of the government's position are not spelled out in its brief. But it is readily apparent that it involves an acceptance of lawlessness and violation of the Constitution which are wholly at odds with our system of government and well-defined limitations on the Speech or Debate Clause. After all, information-gathering activity can include almost any kind of conduct: search, seizure, electronic surveillance, assault, blackmail, theft of documents, bribery, extraction of a confession by torture, false imprisonment, sexual seduction, breaking into a psychiatrist's office, robbery, and every conceivable technique - fair or unfair, lawful or unlawful - that investigators use.

It would be strange indeed if such a range of activities were beyond the reach of the law, but that would clearly be so under the government's

argument.

The main flaw in the government's syllogism is that its premises ignore the firm rule which distinguishes conduct which merely relates to the legislative process from speech or similar conduct which is an integral part of the legislative process. This distinction has been articulated in every case which has dealt with the Speech or Debate Clause. This distinction has made it possible for the Speech or Debate Clause to perform its function as a protector of legislative independence, while at the same time preventing the development in this country of the abuses that prevailed in England for several centuries when legislators considered themselves super-citizens, outside the rule of law, and when weak courts felt unable to protect citizens subjected to abuses by legislators. Applying this distinction to investigative activities of Congress, there is a clear and sharp difference between the issuance of a subpoena and the general run of activity which may precede the issuance of a formal legislative command. 27/

An additional flaw in the government's argument is its failure to recognize the difference between speech and speech-type conduct, such as voting and writing committee reports, and direct physical action such as the taking of documents.

27/ Part of the government's argument is that "an immunity that would protect only when no wrong was alleged to have been committed would be no immunity at all" (Gb25). The government thus confuses the question whether the immunity is applicable to a particular type of conduct with the question of the extent of immunity.

A.

The historical background of the Speech or Debate Clause.

The Speech or Debate Clause has its "taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries," Tenney v. Brandhove, 341 U.S. 367, 372 (1951). The Framers of our Constitution knew very well that the Speech or Debate Clause had been "born primarily of a desire ... to prevent intimidation by an executive and accountability before a possibly hostile judiciary," United States v. Johnson, 383 U.S. 169, 181 (1966). They also knew that English constitutional history at times witnessed gross misuse of the Parliamentary privilege, as noted by Professor Wittke: 28/

> "Privilege played an important role in the great political struggles of the past centuries. At times claims of privilege were used to champion the cause of the people; there were also times when privilege became the greatest oppressor of the subject's liberty. Parliamentary privilege has frequently served as a bulwark of liberty and individual freedom, but on the other hand, in the hands of crafty, powerful and designing politicians eager to perpetuate their control and to gain the utmost personal advantage, privilege has been used as a screen for the basest oppression. There were times when privilege was used to give legal color to a Parliamentary Despotism as

28/ Wittke, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE (Ohio State Univ. Studies, 1921). Professor Wittke's study has been authoritatively referred to by this Court, United States v. Johnson, supra, 383 U.S. at 178.

> oppressive of individual liberty as many Kings with their claims of prerogative have been." Wittke, at 15.

For many years, injured subjects had no redress against an indiscriminate extension of parliamentary immunities. The ordinary courts of the Kingdom were considered "inferior to the High Court of Parliament and could not pass judgment on its claims of privilege." 29/ With the extension

29/ Wittke, supra, at 199. Professor Wittke cites many examples of the "Parliamentary tyranny" which resulted from unchecked extension of the parliamentary privilege. For example, in 1675, in the case of Shirley v. Fagg, 9 Com. J. 354, 6 How. St. Tr. 1162, Wittke points out that the Commons "boldly claimed for the law and custom of Parliament a power transcending the sacred guarantees of Magna Carta and the Petition of Right." Wittke, at 95. See, also, The Case of the Earl of Shaftesbury, 1 Modern Repts. 144 et seq. The famous cases of John Wilkes and the Middlesex Election, see May's CONSTITUTIONAL HISTORY OF ENGLAND, Chaps. IX, X, XI, became, in the words of Professor Wittke, "eventually a contest between the electors of England and the Crown - the latter acting through a controlled and bought House of Commons." And Wittke concludes "under the guise of privilege, the Parliament houses infringed more and more upon the fundamental rights of the electorate of England." Wittke, at 118. The cases involving Wilkes, such as Entick v. Carrington, 19 How. St. Tr. 1154, are well known for their historic contributions to the preservation of personal liberty. But in addition, as Wittke points out, the long struggles of Wilkes demonstrated

[Footnote continued on next page.]

of the parliamentary immunities to members' servants, "the abuse of privilege became intolerable," Wittke, at 200. By the eighteenth century "a corrupt, time-serving Parliament had learned to use the law of privilege to punish personal enemies ... privilege became a real danger to individual liberty ... the common law guarantees of the subject's rights and liberties proved of no effect when matched with a Parliament, determined to vindicate its claim of privilege." Wittke, at 201.

The ultimate resolution of this conflict in England took many years. Not until Stockdale v. Hansard, 9 AD. & E. 1 (1837-1842), was it finally resolved that the legitimate scope of the legislative privilege of immunity must be tested by whether the act sought to be immunized "is indispensably necessary for the performance of the duty they are employed in, and also that it has been uniformly allowed," 9 AD. & E. at 240. Or, as Justice Coleridge placed it, the privilege of legislative immunity is permitted only where required "for the effective discharge of those duties which by the Constitution are cast upon the House of Commons," id. at 218.

Furthermore, no legislative immunity attaches to a "known and undoubted breach of the law," for

[Footnote continued from previous page:] dramatically "how easily a claim of privilege might be used to sanction the arbitrary proceedings of ministers and Parliament, even when a fundamental right of the subject was concerned." Wittke, at 127. See also, Alexander Murray's Case, 1 Wils. 299; Regina v. Paty, 2 Ld. Raym. 1105; Case of Captain Streater, 5 How. St. Tr. 336; Sir Robert Pyle's Case, 5 How. St. Tr. 948.

neither "House of Parliament can authorize any person to commit with impunity a known and undoubted breach of the law," id. at 188.

In this country, the conflicting pulls for legislative immunity on the one hand and the need to protect the citizenry from abuse were far more easily resolved than in England; firstly, because principles of judicial supremacy early became part of the bedrock of our system, and secondly, because the Framers of our Constitution were fully aware of the abuses which had occurred in England as a result of the absence of sharply defined boundaries for the privilege, and made it clear from the outset that no such abuses would be permitted in this country.

Early on, Thomas Jefferson articulated the parameters of the privilege:

> "For any speech or debate in either house they [legislators] shall not be questioned in any other place...; but this is restrained to things done in the house in a parliamentary course... for he is not to have privilege contra morem parliamentarium, to exceed the bounds and limits of his place and duty." Jefferson, MANUAL OF PARLIAMENTARY PRACTICE III, "Privilege."

And in the first case which arose in this land interpreting the Speech or Debate Clause, it was made clear that the scope of the privilege was to be "the judgment of the court," Coffin v. Coffin, 4 Mass. 1, 32 (1808), and, additionally, that:

> "The privileges are thus secured, not with the intention of protecting the members against prosecution for their own benefit, but to support the rights of the people." Id. at 27.

Thus, in the United States, rooted in principles

of egalitarianism, the Speech or Debate Clause, from the beginning, has been viewed functionally in terms of what was truly necessary to protect the operations of the legislature, rather than from the point of view of establishing another group - legislators - who could claim "privileges," in those times so much a part of the English legal structure.

B.

Conduct which is "an integral part of the deliberative and communicative process," as distinguished from that which merely "relates" to the legislative process.

In this Court the Speech or Debate Clause has in its functional sense always been read "broadly to effectuate its purpose," Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501 (1975), and though the Clause

> "speaks only of 'Speech or Debate,' ... the Court's consistent approach has been that to confine the protection of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view... Rather than giving the clause a cramped construction, the Court has sought to implement its fundamental purpose of freeing the legislator from the executive and judicial oversight that realistically threatens to control his conduct as a legislator." Gravel v. United States, 408 U.S. 606, 617-18 (1972).

Accordingly, in addition to actual speech or debate on the floor of Congress (as in United States v. Johnson, supra), the Clause also encompasses voting (United States v. Brewster, 408 U.S. 501 [1972]), resolutions adopted by the body (Kilbourn v. Thompson, 103 U.S. 168 [1881]), committee

hearings (Gravel, supra), and publication for the use of the body of its reports (Doe v. McMillan, 412 U.S. 306 [1973]).

In this manner, the Court has delineated the parameters of the Speech or Debate Clause as including matters "generally done in a session of the House by one of its Members in relation to the business before it," Kilbourn, supra, at 204, underscoring supplied; which includes "written reports presented in that body by one of its committees ... resolutions offered ... the act of voting, whether it is done vocally or by passing between tellers," ibid.

But while the Court has gone beyond the words "speech or debate," it has consistently rejected efforts to extend the Speech or Debate Clause to conduct which is not at the core of legislative activity and which merely relates to the legislative process, even though activities at issue are customarily performed by legislators.

The government's contention in the instant case that the Clause should be so extended is exactly the argument presented by Senator Brewster, who urged "that the Clause protected from executive or judicial inquiry all conduct 'related to the due functioning of the legislative process,'" United States v. Brewster, supra, 408 U.S. at 513. Rejecting that argument, the Court said:

> "In no case has this Court ever treated the Clause as protecting all conduct relating to the legislative process." Id. at 515, emphasis in original.
>
> The Court said further:
>
> "The sweeping claims of appellee would render Members of Congress virtually immune from a wide range of crimes simply because the acts in question were peripherally related to

their holding office." Id. at 520.

The essential distinction drawn by the Court is between conduct characterized as merely "relating to the legislative process," Brewster, supra, 408 U.S. at 515, and conduct which is an "integral part of the deliberative and communicative process," Gravel, supra, 408 U.S. at 625. The decisions of the Court "reflect a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings," id. at 620. The test is definitely not whether the act for which immunity is claimed is one actually done by a legislator, even in his capacity as such. "That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature," id. at 625.

In short, there is a difference between a Senator's making a speech on the floor of the Senate, introducing a bill, voting for a bill, or participating in the issuance of a committee report, and his engaging in the myriad of activities which every Member of Congress undertakes but which are not at the heart of the legislative process. Brewster, supra, 408 U.S. at 516. Such activities may be dealing with the Department of Justice (Johnson, supra, 383 U.S. at 751); they may involve reviewing material antecedent to a hearing (Gravel, supra, 408 U.S. at 628); or the republication of information subsequent to the legislative act (id. at 622, 625; Doe v. McMillan, supra, 412 U.S. at 315), none of which has speech or debate immunity.

Focusing more directly on the issue in the instant case, the Court has in a number of cases dealt with the impact of the Speech or Debate Clause on various forms of the exercise of investigatory or preparatory activity by Congress. The line which this Court has drawn - distinguishing legislative acts which receive immunity from others which are not immunized - is clearly defined. In essence, a subpoena, which is a formal exercise of legislative authority commanding appearance, testimony and possibly the production of papers, is a legislative act, Eastland v. Servicemen's Fund, supra, 421 U.S. at 507; "gathering information for a hearing" is definitely not a legislative act, Gravel, supra, 408 U.S. at 620.

In Servicemen's Fund, the Court dealt with a subpoena and the question whether there was judicial power to enjoin its use. It was clear that if the issue had been presented in terms of the exercise of judicial power to punish refusal to comply with the subpoena, constitutional restrictions would be applied by the courts, 421 U.S. at 509, n. 16.

The question was whether there was independent judicial power affirmatively to interfere with issuance of the subpoena. Since the subpoena is a formal exercise by Congress of its legislative power, the Court, on Speech or Debate considerations and the Separation of Powers doctrine, concluded that the judicial branch had no jurisdiction to act in the matter excepting to the extent of determining whether the subpoena had in fact been authorized by Congress. 30/

30/ "Although the power to investigate is necessarily broad, it is not unlimited. Its boundaries

[Footnote continued on next page.]

But in cases not involving issuance of a subpoena the Court has specifically stated that Members of Congress would not be "immune" if "in order to secure information for a hearing [they] themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides would be immune from liability or questioning in such circumstances. Such acts are no more essential to legislating than the conduct held unprotected in United States v. Johnson, 383 U.S. 169 (1966)." Gravel, supra, at 621.

And that was indeed the precise holding in Dombrowski v. Eastland, 387 U.S. 82 (1967), where the Court, despite the claim of the Speech or Debate Clause, remanded for trial a charge that a Senate employee had engaged in a raid which violated Fourth Amendment rights. 31/

[Footnote continued from previous page:]
are defined by its source." Servicemen's Fund, supra, 421 U.S. at 504. And the question of legislative jurisdiction remained open for judicial determination because "Congress is not invested with a general power to inquire into private affairs." Ibid.

31/ The government's effort to distinguish Dombrowski as having involved a raid to gain evidence for use in a state prosecution, as contrasted with the carrying out of what was an otherwise legitimate function (Gb28-9), finds no support in any of the pleadings or briefs submitted by either side in the Dombrowski case. In fact, the pleadings charged a conspiracy to violate constitutional rights by effecting a seizure and thereafter by the Senate

[Footnote continued on next page.]

The government's entire argument in this case is based upon an effort to extend to non-subpoena investigative activity the kind of immunity that the Court applied in Servicemen's Fund to a formal exercise of legislative power through a subpoena.

[Footnote continued from previous page:]
committee's taking over the papers, with no suggestion that the object of the seizure was to gain evidence for a state trial. The government's brief in Dombrowski strongly contended that the conduct of Mr. Sourwine, chief counsel to the Senate committee, was "within the scope of his duties as an employee and agent of the Senate [and] is protected by the Speech or Debate Clause" (government brief in Dombrowski v. Eastland, #118, October Term, 1966, p. 36) and the government emphasized that Mr. Sourwine was acting for Senator Eastland and the subcommittee and that the subcommittee was conducting an investigation within the sphere of the legitimate legislative functions of the Senate subcommittee (ibid.). There is not a hint in prior papers of a contention that Mr. Sourwine's alleged conduct related to a state prosecution. Indeed, contrary to the government's explanation of Dombrowski, the Court in Gravel analyzed Dombrowski as a case where "the committee counsel was gathering information for a hearing," 408 U.S. at 628, and stated the holding to be that the immunity clause would not extend to "conspiracy with state officials to carry out an illegal seizure of records that the committee sought for its own proceeding," id. at 619; underscoring supplied.

The effort to mask this fundamental distinction appears in the government's treatment of Dombrowski. Twice in the course of its brief (Gb28; Gb38, n. 25) the government distorts Dombrowski, claiming that it approved the "takeover" of papers from state officials who may have illegally seized the same. While there is some doubt whether this Court addressed that question, 32/ the point which the government conveniently ignores is that in Dombrowski the "takeover" was done after the issuance of a subpoena. There were indeed issues in that case as to the authority of the chairman to issue the subpoena and whether a subsequent act of ratification could be effective if there had not been authority, but there was never any doubt in Dombrowski but that it was formal legislative power through a subpoena which had been exercised and the lower court was satisfied that at least for purposes of immunity the subsequent ratification was entirely adequate (see Pet. App. 7a, Dombrowski v. Eastland, #118, October Term, 1966).

Directly within Dombrowski then is the distinction between the use of a subpoena and non-subpoena information-gathering activity. The "takeover" or receipt of documents pursuant to a subpoena was considered beyond judicial power under the Speech or Debate Clause. The engaging in information-gathering activity which included a pre-subpoena raid was outside the protection of the Speech or Debate Clause and was held very

32/ That question was dealt with in the Court of Appeals decision and only inferentially dealt with by this Court in that the lower court decision was affirmed on that issue.

definitely to be subject to judicial remedy by way of a damage action.

So, too, in the Servicemen's Fund opinion the Court emphasized the distinction between a subpoena and preliminary investigative activity, as appears from the following:

> "Respondents rely on language in Gravel v. United States, supra, at 621,
>
> > '[N]o prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances.'
>
> From this respondents argue that the subpoena works an invasion of their privacy, and thus cannot be immune from judicial questioning. The conclusion is unwarranted. The quoted language from Gravel referred to actions which were not 'essential to legislating.' Ibid. See United States v. Johnson, 383 U.S. 169 (1966). For example, the arrest by the Sergeant at Arms was held unprotected in Kilbourn v. Thompson, supra, because it was not 'essential to legislating.' See Marshall v. Gordon, 243 U.S. 521 (1917). Quite the contrary is the case with a routine subpoena intended to gather information about a subject on which legislation may be had." 421 U.S., supra, at 507-8; emphasis in original.

Gravel is particularly significant as demonstrating this Court's refusal to immunize unlawful

"information gathering" activities. There the Court, sua sponte and though certiorari was not even sought upon the issue by the government, refused to extend the Speech or Debate Clause so as to bar inquiry into the sources of information utilized in preparation for legislative acts. 33/ Cf., Mr. Justice Stewart, dissenting in part, id. at 629.

The government's effort to ignore the distinction between a subpoena and information-gathering activity without benefit of an official writ overlooks the teachings of this Court in the cases by which it has established definite parameters about the Speech or Debate Clause. If there is any threshold which distinguishes conduct which merely "relates" to the legislative process from conduct which is an "integral part" of that process, surely it must fall

33/ The Court's sharp distinction between information gathering and legislative acts appears in the following:

> "Neither do we perceive any constitutional or other privilege that shields Rodberg, any more than any other witness, from grand jury questions relevant to tracing the source of obviously highly classified documents that came into the Senator's possession and are the basic subject matter of inquiry in this case, as long as no legislative act is implicated by the questions." Gravel, supra, 408 U.S. at 628.

In making this ruling the Court rejected a concession by the Solicitor General made during oral argument that a Senator could not be questioned about the acquisition of material. Id. at 632-33, n. 4.

between a subpoena and preliminary investigative activity.

A subpoena is a formal exercise of the compulsory process in an investigation. It is a well-defined, observable exercise of power, generally requiring specific authority by a Senator or Member of Congress, cf., Wheeldin v. Wheeler, 373 U.S. 647 (1963). A subpoena's regularity and scope can be, and often are, subjected to judicial scrutiny if an effort is made to enforce it against a recalcitrant witness. See discussion in Servicemen's Fund, supra, 421 U.S. at 509, n. 16. A subpoena does not involve the exercise of force. It is a command, not a warrant, and neither the issuer nor the person serving the subpoena is given the authority thereby to arrest or by force seize persons or papers, cf., Wheeldin v. Wheeler, supra.

By contrast, as pointed out above, investigative activity can be literally anything - and may involve the direct application of force, which is hardly the business of the legislature.

At the heart of the American constitutional system are the Fourth and Fifth Amendments, both representing fundamental controls over the investigatory process of all branches of the government, including the legislature. There is no doubt that the right to search and seize papers without the limitations of the Fourth Amendment would be a useful and powerful tool in the hands of any investigator. So, too, would the right to torture, which acknowledgedly is a most effective investigatory tool. These techniques of "preliminary investigation" or "information gathering" would indeed produce results; at what price is another matter. The government argues that as long as a legislative purpose may be asserted or even established, these constitutional protections evaporate - whether they be

under the First or Fourth Amendment (and, we assume, the Fifth Amendment as well). This argument effectively says that there is nothing to prevent Congressional investigators from engaging in the most brutal form of investigative activity if they but assert a legislative purpose.

That is simply not the law. It flies in the face of all decisions of this Court which have dealt with preliminary investigative activity (Dombrowski, Gravel, and Servicemen's Fund, all supra) and also literally every decision of this Court which has involved the Speech or Debate Clause, out of which there has emerged the sharp distinction between conduct which merely relates to the legislative process and conduct which is an integral part of the deliberative and communicative process.

C.

The Speech or Debate Clause does not extend to direct physical action by legislators or their aides.

We submit that no pre-subpoena "information gathering activity" is encompassed within the Speech or Debate Clause. We suggest, however, that even if the Court were of the view that under certain circumstances some such activity could be so covered, it would certainly not include direct physical actions, as distinguished from words or word-like conduct such as voting.

Particularly appropriate to this point is an incisive question put by Chief Justice Theophilus Parsons in Coffin v. Coffin, supra, in the midst of oral argument:

> "Chief Justice. Would you extend the privilege to actions as well as words? Suppose, for instance, one member should assault or beat another in the presence of the house; would he

> not be answerable in an action, or on an indictment, in a court of law?
>
> Bidwell. Unquestionably he would. For it is the freedom of deliberation, speech, and debate, only, and not of assaulting and beating, that is secured by the constitution. For other personal injuries and abuses, a member may be answerable or indictable; but not for any abuse of the freedom of deliberation, speech, and debate, in the house." 4 Mass. at 11-12.

This distinction between action on the one hand and speech and speech-type conduct on the other is more recently developed in Gravel, where the Court analyzed some of its earlier decisions.

In referring to Kilbourn, supra, the Court noted that there would indeed be absolute immunity in so far as concerned the adoption of a resolution directing an arrest; "that act was clearly legislative in nature." But the arrest itself was not a legislative act and thus "[t]he Speech or Debate Clause could not be construed to immunize an illegal arrest even though directed by an immune legislative act." Gravel, 408 U.S. at 619.

In referring to Powell v. McCormack, 395 U.S. 486 (1969), the Court pointed out that the Members of Congress were immune because they had done nothing but vote for a resolution, but that employees of Congress would be subject to suit for the physical act of barring a Member from his seat, 408 U.S. at 620.

In referring to Dombrowski, it pointed out that committee counsel was charged with "conspiring with state officials to carry out an illegal seizure of records that the committee sought for its own proceedings ... unlawful conduct ... [which] the Speech or Debate Clause simply did not immunize," 408 U.S. at 619.

The exercise of the actual force of government which is involved in either an arrest or search and seizure is not the business of legislators; they may speak, hold hearings, publish reports, vote, enact laws, and by subpoena even command testimony or production of papers. They have the limited power to hold persons in contempt for refusal to testify, Marshall v. Gordon, supra, 243 U.S. 521 (1917), provided they are acting within their jurisdiction, Kilbourn v. Thompson, supra; they have the power specifically granted by the Constitution to punish and imprison their own Members for "disorderly conduct," Kilbourn, supra, 103 U.S. at 189-90. But the legislature does not have the general power to employ force against a citizen - by arrest, physical punishment, or search and seizure. Those powers were never lodged within our legislature which, unlike Parliament in England, has never been considered a court. Cf., Kilbourn, id. at 183.

It is thus clear that, quite aside from the fact that the conduct here was without writ and therefore outside the parameters of the Speech or Debate Clause, it would have been outside the business of the legislative body even if there had been a writ. The legislature does not have the power to issue a writ of attachment or warrant to seize property, nor a fortiori may it seize property without a warrant. Seizure of property with or without a a warrant is the business of the executive branch of the government, subject, under the Constitution, to controls by the judiciary.

The facts of this case mirror the kinds of abuses which grew out of an unrestrained exercise of Parliamentary privilege in English history. But were the government's pos ition here to be adopted, the quantitative impact of such a decision

would make the English experience pale by comparison. In the light of Gravel, supra, 408 U.S. at 618, Congressional staff members are given the same immunity that is afforded to Members of the legislature. Inspection of the Congressional Directory for 1977 reveals that there are 15 standing committees of the Senate and 22 of the House; there are 11 select and special committees of the Senate and 10 of the House; there are seven joint committees. These committees have a total of 1933 staff members. 34/ Inquiry of the offices of the clerks

34/ The breakdown of staff members for each committee, as appears in the Congressional Directory, is as follows:
Senate Standing Committees: Agriculture (27), Appropriations (69), Armed Services (28), Banking (39), Budget (66), Commerce (90), Energy (18), Environment (44), Finance (36), Foreign Relations (60), Governmental Affairs (37), Human Resources (37), Judiciary (11), Republican Conference (14); House Standing Committees: Agriculture (53), Appropriations (73), Armed Services (37), Banking (3), Budget (62), District of Columbia (44), Education & Labor (48), Government Operations (50), Interior (55), International Relations (69), Interstate & Foreign Commerce (136), Judiciary (75), Merchant Marine (32), Post Office (12), Public Works (92), Science (57), Small Business (4), Standards of Official Conduct (9), Veterans (29), Ways & Means (79); Senate Select & Special Committees: Aging (14), Democratic Senatorial Campaign (3), Ethics (1), Intelligence (17), National Republican Senatorial (4), Nutrition (15), Republican Policy (12), Small Business (15); House Select & Special Committees: Aging (25), Assassinations (23), Democratic National Congressional (5),
[Footnote continued on next page.]

of the Senate and the House indicates there are approximately 7,000 staff employees of Members (each is allowed a maximum of 18) and approximately 3,000 in the Senate (Senators' staffs range from five to 40). Upon the government's argument, each of these 12,000 persons, in addition to the 535 Senators and Representatives, would be entitled to immunity against any claim that constitutional rights had been violated, so long as they claim that their activities were investigative and related to a matter on which legislation could be had.

As we pointed out above, this Court rejected exaggerated claims of immunity and super-citizenship made on behalf of the executive branch of the government, United States v. United States District Court and United States v. Nixon, both supra, even though the claims were couched in terms of the needs of national security and were made only on behalf of the chief executive. It would be wholly inconceivable that broad, undefined and unlimited claims of immunity would be recognized as being vested in an army of legislative employees with power to repeat the kind of outrage which was visited upon the McSurelys.

The boundaries of the Speech or Debate Clause have heretofore been precisely delineated because

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[Footnote continued from previous page:] Democratic Steering (7), Ethics (5), Narcotics (10), National Republican Congressional (2), Outer Continental Shelf (12), Republican Policy (1); Joint Committees: Atomic Energy (19), Congressional Operations (12), Defense Production (7), Economic (46), The Library (2), Printing (27), Taxation (54). Summary: 58 committees, 1933 staff members.

the Court is fully aware that the Clause places certain persons above the law. Granted that sound historical reasons call for this privilege, early as well as recent history requires that any such exceptions from the "rule of law" remain closely circumscribed.

II.

THE CONDUCT OF THE DEFENDANTS HERE DOES NOT EVEN "RELATE" TO LEGITIMATE LEGISLATIVE ACTIVITY.

We have argued above that the Speech or Debate Clause does not provide immunity for conduct which merely relates to what otherwise might be a legitimate legislative investigation and does not involve the use of the formal legislative device of a subpoena. But the unique facts of this case take it outside of even the penumbra of arguable relationship. As stated by Judge Leventhal,

> "This case is unusual because Brick in testimony at the McSurelys' contempt trial conceded that when 'he went to Pikeville to examine the documents in the Court House,' he looked through the papers and books and determined there were 'many' items that he 'didn't need at all,' including a letter addressed to plaintiff Margaret McSurely, as 'Dearest Cucumber,' from a prominent newspaper columnist."
> (Pet. App. 34a-35a.)

At that point Judge Leventhal quoted from the testimony of Mr. Brick set forth on p. 13 , supra.

It should be observed that in this case the Complaint specifically alleged a conspiracy to take documents "for the private purposes of the defendant McClellan in order to ... intimidate" the McSurelys and individuals with whom they may have been associated (A. 31) and that what was involved was a use of "the instrumentality of the investigation to carry out a personal vendetta between himself [McClellan] and a certain personage of prominence named in some of the private correspondence of the plaintiff Margaret McSurely" (A. 35).

Even where conduct at issue involves a clear exercise of legislative power, e.g., the issuance of a subpoena, the question of authority for the exercise of power is open for judicial determination. "Although the power to investigate is necessarily broad, it is not unlimited. Its boundaries are defined by its source." Servicemen's Fund, supra, 421 U.S. at 504, n. 15.

A Senator does not by virtue of his office have any power to issue a subpoena. He has that power only to the extent that the Senate by resolution has authorized him, or more likely a committee, to exercise Senatorial subpoena power in respect to a matter duly delegated to theSenator or his committee. We need not be detained by the question whether a court would have the power to prevent the enforcement of a subpoena where a Senator admitted that, though he was using a legislative tool, his objective was strictly personal and wholly non-legislative. It may be, though it is doubtful, that the claimed inviolability of a legislator's motive (Tenney v. Brandhove, 341 U.S. 367, 377 [1951]) would prevail even in such a situation. Surely no such sacrosanct character may be claimed for information-gathering activities. We have demonstrated above that no pre-subpoena investigative actions command immunity. If the Court should disagree and be of the view that some such activity is immunized, surely that immunity would not extend to such activities as were admittedly carried out for non-legislative purposes.

On the face of this record we believe that Judge Leventhal's argument is unassailable:

> "Brick's testimony at the contempt trial ultimately may be explained away to the satisfaction of a jury. But it is plainly sufficient to preclude an automatic dismissal of the

lawsuit at the threshold, on the basis of legislative immunity. 'To hold otherwise would be to invite gratuitous injury to citizens for little if any public purpose.' Doe v. McMillan, 412 U.S. at 316-17." (Pet. App. 38a-39a.)

In this connection we observe the argument appearing on page 42 of the government's brief, n. 30, to the effect that "it is not clear ... that Brick knew at the time that the documents were irrelevant" (emphasis in original). We do not know how such an argument can be made in the face of the specific testimony of Mr. Brick, as follows:

"Q Did you tell Mr. Dotson or any of the folk with whom you met there that there was some of that stuff that you didn't think that you needed?

A Yes.

Q Did you give it back to them?

A No." (A.101)

There is an attenuated argument in the government's brief to the effect that Mr. Brick had a right to take papers even if at the moment he thought them irrelevant so that there could be a subsequent evaluation of their relevance (Gb41). This theoretical formulation has nothing to do with the record in this case, and overlooks the special treatment of the "Dearest Cucumber" letter by Senator McClellan. The Senator "glanced" at that letter (A.100), written by a nationwide columnist who had strongly attacked him (U.S. v. McSurely Trial Tr., 1026-1030A) and then gave Mr. Brick "different instructions on that" (A.100). He directed that it be put under lock and key, not to be inspected by anyone except himself, Mr. Adlerman, or Mr. Brick, thereby keeping it out of the files of the Committee and excluding even his Committee colleagues from an opportunity to

inspect it. There is not the slightest suggestion that during the entire 13-month period when the Senator had this letter in his control there was any consideration of the possible relevance of the "Dearest Cucumber" letter to any legitimate investigation then being conducted by the Committee (Pet. App. 53a). 35/ Nor could there have been any such legislative use of this material. Judge Leventhal correctly pointed out that the material here was so far out of bounds - and there was such a clear concession of a lack of legislative basis therefor - that the court's "selective approach to evaluating Brick's conduct ... is consistent with and compelled by the pertinent Supreme Court decisions interpreting the Speech or Debate Clause," dissenting opinion at time of panel decision (Pet. App. 183a). He continues:

"[O]nce private material was examined by

35/ There is a truly frightening suggestion in Judge Wilkey's opinion that a Senate committee authorized to investigate civil distrubances could legitimately be interested in the relationship between Margaret McSurely and Drew Pearson because "[h]e and what he wrote could be influenced by a woman for whom he had affection" (Pet. App. 108a).

The resolution under which Senator McClellan and his staff were purporting to act had to do with urban riots and their causes, and no one has yet suggested that anything that Drew Pearson wrote or did not write affected whether or not a riot had occurred.

Brick and there was no arguable basis for appraising them as relevant, his further actions in retaining and transporting them were non-legislative." (Pet. App. 184a). 36/

The argument made by the government here tends only to underscore the inappropriateness of a claim of legislative immunity for any "preliminary" legislative activity. Certainly it shows that no such immunity can as a matter of law, and before trial, be established where there is an admission under oath in a court of law that no legislative purpose existed for the acts complained of. 36/ Judge Leventhal offered an analogy which is quite appropriate:

"The improper and non-legislative nature of Brick's conduct is indicated by analogy to the authority granted by a search warrant. Where a warrant is issued that describes particular papers, objects and effects that are germane to the pending inquiry, any further seizure is clearly actionable. Other material may be inspected only for the limited purpose of determining whether it comes within the matters particularly described and authorized for seizure. Brick's examination exceeded the bounds of a threshold 'search' for purposes of determining relevancy. Much like the police officer who in the course of executing a search warrant seizes material which he knows is not authorized by the warrant cannot be deemed to have engaged in a lawful search and seizure, certainly Brick's unauthorized, knowing selection and display of private papers beyond the scope of the subcommittee's inquiry cannot be deemed a legitimate legislative act." (Pet. App. 182a-183a.)

III.

UPON THE PLEADINGS AND ADMITTED FACTS, A MORE THAN "COLORABLE" CLAIM OF VIOLATION OF THE FOURTH AMENDMENT AND PRIVACY RIGHTS OF THE McSURELYS HAS BEEN MADE AGAINST EACH OF THE DEFENDANTS.

It is of course clear that the absence of immunity does not of itself establish liability. At a trial, the McSurelys must establish that some right, constitutional or otherwise, has been violated.

The issue in this case at this time is only whether the McSurelys are entitled to have a trial where they may make such proof. Contrary to the position asserted by Judge Wilkey, the McSurelys contend that their rights under the Fourth Amendment and their right of privacy have been violated. As explained above (supra, p.33), the issue here discussed is developed mostly in Judge Wilkey's opinion and is referred to only limitedly in the government's brief.

If, as we have demonstrated, the acts and conduct complained of are outside the parameters of the Speech or Debate Clause, and if it further appears that such acts and conduct breach important rights of the McSurelys, then the cause of action is sustainable.

A.

The McSurelys' Fourth Amendment rights were violated.

Despite the enormity of the invasion of the McSurelys' rights, Judge Wilkey argues that the federal defendants are nevertheless free of liability because, so he claims, there is no impropriety in the mere receipt of documents illegally seized by third parties.

Fundamental to his argument is the thesis that once the McSurelys had their rights violated by Kentucky officials, even if by a seizure in violation of the Fourth Amendment, any subsequent taking of documents from the Kentucky officials by others is beyond the reach of the law, and this despite the fact that the McSurelys had already gone to court and, subject to a right of appeal, had won the right to the return of their papers. In essence, the argument urges that once one law enforcement official has violated Fourth Amendment rights by an unconstitutional seizure, the hapless citizen-victim is fair game for any other government official who might be involved in a subsequent or secondary taking of the citizen's papers, regardless of any intermediate legal actions which are taken by the victim to halt the invasion of rights.

We submit this argument is based on a plain misreading of some recent Fourth Amendment decisions of this Court. In a word, Judge Wilkey relies on cases which hold that the exclusionary rule is inapplicable in selected situations where items have been unlawfully seized, and seeks to read those cases as if they held that there are no

Fourth Amendment violations in any subsequent or secondary taking of property previously seized.

But the issue of the applicability of the exclusionary rule to the subsequent use of evidence after an earlier seizure is totally different from whether an individual who takes previously illegally-seized documents may be subject to a damage action for violation of Fourth Amendment rights.

In support of his contentions, Judge Wilkey relies most heavily on United States v. Calandra, 414 U.S. 338 (1974), but he also cites United States v. Janis, 428 U.S. 433 (1976), and Burdeau v. McDowell, 256 U.S. 465 (1921). These cases deal only with the exclusionary rule; in no way do they negate a claim for damages; indeed, as we later point out, Calandra in particular supports such claims. The concern of the Court in this series of cases, as stated in Janis, was whether the exclusionary rule was appropriate since it was unlikely to have its supposed deterrent effect. And it is obvious from a reading of Janis that the Court is reassessing the workings of the exclusionary rule in a wide variety of situations. 37/

Significantly, the government does not in its brief press Judge Wilkey's argument, nor does it even cite Calandra. While the government gives no explanation therefor, we believe that it recognizes that Calandra emphasized that an important factor permitting limitations on the exclusionary

37/ Judge Leventhal's opinion at the time the first panel considered this case includes an analysis as to why, despite Calandra, the exclusionary rule might still be applicable to a Congressional use of material after a seizure by state authorities (Pet. App. 187a).

rule is the existence of other available remedies, particularly damage suits, against those responsible for the invasion of constitutional rights. Thus, the Court there said:

> "It should be noted that, even absent the exclusionary rule, a grand jury witness may have other remedies to redress the injury to his privacy and to prevent a further invasion in the future. He may be entitled to maintain a cause of action for damages against the officers who conducted the unlawful search. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971). He may also seek return of the illegally seized property, and exclusion of the property and its fruits from being used as evidence against him in a criminal trial. Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931). In these circumstances, we cannot say that such a witness is necessarily left remediless in the face of an unlawful search and seizure." 414 U.S. at 354.

It is clear, then, that cases which deny application of the exclusionary rule may not be read as giving a gloss upon what constitutes a violation of the Fourth Amendment. They deal only with whether in a given situation the criminal (or civil tax defendant) should go free "because the constable has blundered." Cardozo, C.J., in People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

If recent exclusionary rule cases have had any impact at all upon civil suit remedies against the "blundering constable," they have strengthened and buttressed this remedy, rather than undermined it. Considering the conflicting pulls of law enforcement versus the privacy protected by the Constitution, the Court is obviously reconsidering the efficacy

and desirability of the judge-made exclusionary rule in certain circumstances. Far from suggesting a comparable diminution of the civil remedy, the Calandra opinion shows that the Court views the existence of the civil remedy as one of the considerations which permits the curbing of the exclusionary rule as the corrective device for violation of rights by law enforcement officers.

We do not undertake a debate as to the relative efficacies of the exclusionary rule and the civil damage action as a means of controlling violations of the Fourth Amendment by law enforcement officials. Cf., Amsterdam, "Perspectives on the Fourth Amendment," 58 Minn. L. Rev. 349, 429 (1974). Our point is simply that one cannot have it both ways. One cannot argue that the exclusionary rule is ineffective, and also unnecessary because of the existence of civil remedies, and then argue that civil remedies are unavailable in a given situation because the exclusionary rule would not be applied thereto. There was a time when the exclusionary rule was not applied at all; and, to the extent that any steps have been taken to limit the application of that rule, each such step emphasizes the importance of, and need to preserve, the vitality of the civil remedy.

Once it is clear that standards employed in determining the applicability of the exclusionary rule do not govern damage suits, then it seems plain that determination of liability of one who receives and transports documents illegally seized by others must depend upon what the receiver did. Was he nothing but a passive recipient or was he an active intervenor in the process?

Judge Leventhal's opinion points up the significance of Mr. Brick's participation in this matter:

"This case is shaped by appellants' position in the pleadings. It does not involve, nor require probing what legal consequences would be appropriate for, an instance of a truly passive receipt by Subcommittee personnel. This is not a case where appellants had nothing more to do with the seized documents than to be in the office at a time when, without prearrangement, Ratliff spontaneously either deposited the documents on Brick's desk in the Subcommittee office in Washington or disclosed their contents to the public at large. The pleadings before us are entirely congruent with the situation as presented in the stipulations of counsel for the McSurelys and the United States in an earlier case and Ratliff's testimony at the contempt trial, that the inquiry was initiated by the Subcommittee, and that Brick took active steps to obtain access to the seized materials and cart back from Kentucky to Washington copies of the McSurelys' documents, including two separate visits to the walk-in vault room where the originals were stored. Appellants' counsel contend that Brick 'played no role in the selection of the documents he would be given.' Brick's own testimony at the contempt trial indicates that his activites included some discretion in selection of what he examined and re-examined. Moreover it cannot rightly be put that there is no claim within the cognizance of the Fourth Amendment because of the co-operation of the custodian. Cooperation of a custodian without authority to grant access may obviate use of force, but it does not validate an otherwise unlawful search and seizure." (Pet. App. 24a-26a; footnotes omitted.)

Mr. Brick was anything but a passive unknowing participant. He is charged in the pleadings with being in active conspiracy with the other federal defendants and with Mr. Ratliff to intimidate and harass the McSurelys to prevent them from continuing their activities in Eastern Kentucky and to obtain personal papers of Mrs. McSurely for the private purposes of Senator McClellan. All of the specific acts subsequently described are claimed to be part of this conspiracy (A.30). Supplementing Judge Leventhal's discussion, we note that while Mr. Brick tried to give the impression that he played no part in the selection of the papers given to him, the record shows that the Kentucky officials had a conversation with Mr. Brick before they culled through the massive material to select the 234 documents which they gave him the following day (supra, n. 9). And if all that the Kentucky officials discussed the preceding day was that "the materials seized from [the McSurelys] ... contained references to a meeting immediately preceding a riot in Nashville, Tennessee, and to organizations suspected of instigating riots" (Gb4), why is it that the 234 documents selected after that discussion have little or nothing to do with those subjects but instead are heavily weighted with personal material relating to Mrs. McSurely? (Supra, p. 12.)

So far as we know, the "silver platter" doctrine developed before Elkins v. United States, 364 U.S. 206 (1960), was applied only to "exclusionary rule" cases and was not applied to any determination of liability for damage by those participating in either the first seizure or the subsequent use of illegally-seized documents. But even in the "silver platter" days, certain types of cooperation between the two takers short of actual

participation in the seizure implicated all takers as a team and the exclusionary rule was held applicable, Lustig v. United States, 338 U.S. 74 (1949); and see Kamisar, Wolf and Lustig, "Ten Years Later: Illegal State Evidence in State and Federal Courts," 43 Minn. L. Rev. 1083 (1959). Moreover, when the first taker was performing no law enforcement function of his own but was merely serving the interests of the second taker, "silver platter" did not apply, Gambino v. United States, 275 U.S. 310 (1927). At the time Mr. Ratliff and his team started working with Mr. Brick, they had lost their case and were not appealing. What independent law enforcement function were they then performing?

The pleadings here charge an active and ongoing conspiracy involving Mr. Ratliff and all four federal defendants to continue a program of harassing the McSurelys to prevent them from continuing their activites in Kentucky; to obtain all their papers, including their personal papers, for the private purposes of Senator McClellan, and to obtain membership lists of organizations seeking to enforce minority rights despite rulings of this Court protecting such lists; and to use the device of a Subcommittee investigation to discredit individuals and organizations working for impoverished citizens (A.30-31).

The Amended Complaint then in essence charges that, purusant to and as a part of this conspiracy, Mr. Brick affirmatively reached out for the McSurely papers and took them to Washington where he exhibited them to persons unknown, to the damage and embarrassment of the McSurelys (A. 31-32). The Complaint also charges a plot to conceal the surreptitious taking of papers by seeking to obtain them by a subpoena before the

McSurelys could act (A.32). This is not the kind of passivity which is at the heart of "silver platter" even if that doctrine were applicable to a damage action.

But there is one feature of this case which completely takes it out of the atmosphere of innocence sought to be developed by the government: Mr. Brick's taking the material in the teeth of the safe keeping order of September 14, 1967, in Judge Leventhal's words "makes all the difference in the world" (Pet. App. 46a).

It is inconceivable that even where the aggrieved citizen has gone to court to obtain relief from an unlawful seizure, has obtained an adjudication that it was indeed unlawful, and has an order of a court that the items be kept in safe keeping, that nevertheless an employee of another agency or sovereignty does not commit an independent Fourth Amendment violation when he reaches out for, and surreptitiously obtains, the documents which were supposed to be in safe keeping. To so hold makes a mockery of the judicial process, the only remedy available to the citizen who has been victimized by unlawful search and seizure. As pointed out above, Calandra emphasized that the citizen who was the object of an unlawful search was not "left remediless." "He may," said Mr. Justice Powell, "seek the return of the illegally seized property," 414 U.S. 338, 354, n. 10. And if he does, and obtains a court order for the safe keeping of his property, can it be that no new violation of his rights has been effected when another official secretly takes the seized property behind the back of the court?

At issue is public confidence that resort to judicial remedies can be useful. Surreptitious inter-governmental shuffling of illegally seized

papers cannot be allowed to continue unabated where the citizen has sought and obtained relief from the courts to protect his constitutional rights.

In its brief, the government analyzes the matter of violation of that order as if it were solely a question of possible vicarious liability on the part of Mr. Brick for Mr. Ratliff's violation of the order (Gb38). The government's presentation both misstates and skews the record and overlooks the full significance of the litigation to effect the return.

As to the record, the government overlooks that the pleadings in this case assert a continuing conspiracy between Mr. Brick and Mr. Ratliff which would impose direct responsibility on Mr. Brick for violation of the court order in addition to that which would also flow from F. R. Civ. P. 65(d), acknowledged by the government at Gb39, n. 27. The government says in that note, with no citation, that "Brick was not Ratliff's agent or catspaw." The pleadings, however, charge Mr. Brick directly with being a co-conspirator of Mr. Ratliff's. The government repeats its version of a highly disputed fact: "Brick played no role in the selection of these copies" (Gb40), but see supra, p.11, n. 9; p. 34. Assuming these differences are material, they can be resolved only by a trial.

The government states that, "Brick did not learn of the 'safe keeping' order until after he had received the copies furnished by Ratliff and Scott" (Gb40). But what did he do when he did learn of the order? Did he return the papers directly after he saw the order, so that his previous taking could be attributed to an "error"? No, he took them to Washington and kept them for 13 months

while the McSurelys litigated the force of a court order which had already determined that their documents had been taken illegally.

The full significance of the court's ruling of September 14, 1967, was that it was an adjudication of illegal taking in a litigation where the McSurelys specifically demanded return of their papers. 38/

Both Judge Wilkey (Pet. App. 72a et seq.) and the government (Gb39) have engaged in an extremely parsimonious reading of the September 14, 1967, order. They have read it for loopholes rather than for sense. We submit that such readings, aside from the fact that they are plainly incorrect (Pet. App. 27a-30a), seem to miss the point.

Let us suppose for a moment that there had been no order of September 14 and that the Kentucky District Court was considering an application for a return of the papers. Should not the mere pendency of the proceeding have been sufficient to stop inter-sovereign shuffling of illegally seized papers? The McSurelys had, after all, submitted their issue to the court and the matter would at least be sub judice. Would not Mr. Brick's taking of the documents even in such a circumstance have been enough to have established him as an active - not a passive - figure in the totality of the denial of the McSurelys' rights?

38/ The Complaint, which sought an injunction against the prosecution, also included a demand for an order "directing the appropriate defendants, their agents, servants, employees and attorneys and all others acting in concert with them to account to plaintiffs for the property seized from them or some of them from the home of the individual plaintiffs on the night of August 11-12, 1967, and to return said property forthwith to the appropriate plaintiffs." See jurisdictional statement, McSurely v. Ratliff, No. 1113, October Term, 1967, 40a.

In the face of the order, however, it is simply not possible to view one of the shufflers as anything but an active participant, liable in damages for his own contribution to the denial of constitutional rights.

B.

The McSurelys' right to privacy was violated.

Judge Leventhal was of the view that, separate from their Fourth Amendment claim, the McSurelys could have a valid claim of breach of their right of privacy, if not under federal law as a constitutional tort, then certainly under local law. In respect to the latter he pointed out that such a claim would be triable in the federal court under principles of pendent jurisdiction, citing United Mine Workers v. Gibbs, 383 U.S. 715 (1966) (Pet. App. 53a).

Judge Wilkey argued that under Paul v. Davis, 424 U.S. 693 (1976), there was no constitutional basis for a claimed breach in privacy.

The government's brief substantially ignores the right of privacy claim, as it did the Fourth Amendment issue.

The American Law Institute Restatement of the Law of Torts has identified four different ways in which (at least as of this time) the right of privacy may be invaded. One of them is defined as "unreasonable intrusion upon the seclusion of another, as stated in Sec. 652B." That section reads as follows:

> "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."

Paul v. Davis, supra, held that defamation by a state official in the performance of his duties did not effect a deprivation of rights of "liberty" or "property" protected by the Due Process Clause. The Court was careful to limit its opinion to defamation arising out of official disclosure of a fact; obviously it did not hold that other breaches of privacy might not rise to the level of constitutional tort. And the American Law Institute Restatement carefully differentiates invasion of the right of privacy which results from "intrusion upon seclusion," as set forth above, from such invasion as results from publicity given another's private life, which is covered by Sec. 652D.

Here the breach of the right of privacy involved not defamation but the taking and dissemination of copies of intimate papers. If for some reason the Court should consider that the taking did not constitute a Fourth Amendment violation, nevertheless the taking and dissemination clearly involve an intrusion into private affairs. Moreover, in this case the intrusion was effected by the taking of property - copies of intimate correspondence - and is to that extent wholly different from the circumstance considered in Paul v. Davis.

The fact that the Court held that one's reputation is not property protected by the Due Process Clause obviously does not mean that one's papers are not property. Nor need we be detained by the question whether the taking of copies of papers constitutes a taking of property. The government resolved that question in the Ellsberg case (United States v. Russo, et al., U.S.D.C., Central Dist. Ca., No. 9373-WMB-CD) when it charged the defendant with having stolen government property by

taking copies thereof. 39/

Since the Amended Complaint charges that property was thus taken from the McSurelys by the federal defendants, the case may be analyzed either as a denial of a right of privacy or as a classic form of the taking of property. In either event, Paul v. Davis is inapplicable.

Lastly, from the point of view of the application of the Speech or Debate Clause to investigatory activities of Congress, it matters not whether the breach of constitutional rights is of the Fourth Amendment, the Fifth Amendment, or the right of privacy. This Court has indeed said:

> "On the other hand, no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen." Gravel v. United States, supra, 408 U.S. at 621, underscoring supplied.

We do not deem it necessary to add to Judge Leventhal's comment with respect to pendent jurisdiction if the denial here of the right of privacy were to be considered a non-constitutional tort (Pet. App. 52a-53a).

39/ The government's point in Ellsberg, supra, was that it was the "information contained" in the papers which constituted government property, so that the taking of copies of government papers constituted a taking of government property. See, United States v. DiGilio, 538 F. 2d 972, 977 (3rd Cir., 1976), and Report of the Senate Judiciary Committee referred to in n. 9 (ibid.).

IV.

THE SPEECH OR DEBATE CLAUSE DOES NOT IMMUNIZE NON-LEGISLATIVE CONDUCT WHICH VICARIOUSLY CAUSES A DENIAL OF CONSTITUTIONAL RIGHTS; IN ANY EVENT, THE DEFENDANTS HERE ACTED DIRECTLY, NOT VICARIOUSLY; NOR DOES THE SPEECH OR DEBATE CLAUSE IMMUNIZE PRE-SUBPOENA SEIZURE OF PAPERS ON THE THEORY THAT, THOUGH IRRELEVANT, THEY MAY LEAD TO RELEVANT DATA.

A.

There is no special rule protecting legislators merely because they act vicariously.

The government makes the following argument:

> "Even if Senator McClellan had explicitly instructed Brick to act as he did, he still would be protected by legislative immunity" (Gb34).

As authority, the goverment cites Kilbourn v. Thompson, Doe v. McMillan, and Powell v. McCormack, all supra. The government then continues:

> "Senator McClellan's role in authorizing Brick's investigation therefore cannot be the basis of liability. If, as Kilbourn and Powell establish, Members of Congress are not liable even for issuing explicit directions that other persons act in a way that violates the Constitution, surely they are not liable for simply not supervising congressional employees sufficiently to prevent misconduct." (Gb35.)

The government then carries the argument further and, having developed a general theory of legislative immunity for vicarious conduct, it

contends that the same theory "should apply equally to the question whether one legislative employee may be vicariously liable for the acts of another" (ibid.).

This entire argument is founded on a misreading of the cases which the government cites and a failure to note the careful analysis made in Gravel v. United States which we discussed supra, p. 59.

A legislator is not liable for the unconstitutional acts of his subordinate if the act of the legislator in directing the conduct is itself a legislative act - and that is exactly what Kilbourn, Doe, and Powell hold. 40/ Legislators do not, however, have a special kind of immunity for vicarious liability if their directive acts are non-legislative.

In Kilbourn, Powell, and Doe, the legislators could not be held liable for voting an invalid resolution since voting was clearly a legislative act, though their employees could be held liable for implementing an invalid resolution since the implementation was clearly not a legislative act.

There is no general rule that legislators have a special exemption from normal rules of vicarious responsibility which apply to all citizens; the Speech or Debate Clause comes into play only when the particular conduct with which they are charged is a legislative act, such as a vote.

If Senator McClellan directed Mr. Brick to search and seize the McSurely papers before a

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40/ In Kilbourn and Powell, the legislative act was voting on a resolution. In Doe, the act was also voting in the House, "sitting as a committee of the whole House," see 412 U.S. at 341; and see reference to "non-legislative directives" in Doe v. McMillan, 412 U.S. at 315.

subpoena issued - and that is what the Amended Complaint in essence charges - and if, as we argued above, Mr. Brick's conduct did not constitute a legislative act - then clearly neither was the Senator's. He did not vote or speak on the floor or in committee. He acted completely on his own and outside of the kind of conduct which commands legislative immunity under the Speech or Debate Clause.

The idea that legislators and their aides have special rights applicable to them when they work through others is the same kind of pernicious perversion of the Speech or Debate Clause which the courts have rejected. Suppose it were not a search and seizure; suppose it were a physical assault (the McSurelys, it will be recalled, allege that they were bombed out of Pikeville [A.36]), which some legislator thought would assist in the performance of his "investigative activity," and the legislator directed someone to do it for him. Does the government seriously contend that anything in the Speech or Debate Clause protects the legislator because he acted through an agent and not directly?

B.

In any event, the record clearly charges direct, not vicarious, involvement by defendants McClellan, Adlerman and O'Donnell.

The government argues (Gb34) that "Senator McClellan is immune for his role in authorizing the investigation" and then blandly states that "the record therefore shows no more than that Senator McClellan authorized in general terms Brick's investigatory activity" (ibid.).

But on this record, the charges against Senator McClellan go far beyond a mere matter of generally authorizing Mr. Brick to act.

Thus, it plainly appears on the record that the Senator became personally involved in the treatment of what was obviously the prize of the entire seizure: "Dearest Cucumber." He was not content to allow Mr. Brick to determine what to do with it. He did not order Mr. Brick to send it back; he took control and directed that it should be kept. If there were even a hint that the Senator was using this material as part of legitimate legislative business, there might be a different situation. But the record is barren of any such suggestion. In any event, on this record, the government can not sustain its characterization of the charge against the Senator as being based exclusively upon his authorization of the investigation.

In fact, the Complaint in this case charges that before the time Mr. Brick showed him the letter, the Senator was involved in a conspiracy with Messrs. Brick, Adlerman, O'Donnell, and Ratliff, part of which included the taking and transporting of papers which were subject to the safe keeping order of September 14, 1967, and which Mr. Brick has conceded were unrelated to legislative activity. Senator McClellan's carefully drafted affidavit denies involvement in any conspiracy in respect to the original "illegal police raid" conducted by Mr. Ratliff (A. 49, par. 4). His affidavit carefully does not dispute that he was involved in a conspiracy with Messrs. Brick and Ratliff in respect to the subsequent inspection and taking of the materials to Washington. He carefully does not dispute the allegations of the Complaint that one of the objects of the conspiracy was

to intimidate the McSurelys and persons with whom they were associated for the "private purposes of defendant McClellan" (A. 41). 41 / And the allegations of the Amended Complaint are specifically supported by an affidavit of the McSurelys (see A. 55, par. 4) which also disputed each and every allegation of the McClellan affidavit.

The government characterizes Senator McClellan's affidavit as stating "that he participated in the events described in the complaint only as Chairman of the Subcommittee, authorizing the Subcommittee's investigation" (Gb34). In fact, the affidavit does not even do that; the affidavit ignores the allegations of the Complaint which made specific charges that the Senator was directly and personally involved in a conspiracy with Messrs. Brick and Ratliff to take the McSurelys' papers before a subpoena issued.

The government argues for the same misreading of the record in the case of Messrs. Adlerman and O'Donnell as it seeks for Senator McClellan. In fact, the defendants Adlerman and O'Donnell are not charged with vicarious responsibility; the allegation against them, as against Senator McClellan, is that they were personally and directly involved in a conspiracy with Mr. Brick.

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41 / Senator McClellan's affidavit appears to seek his own exoneration by setting forth Mr. Brick's testimony that it was the Senator who ordered Brick to retain "Dearest Cucumber" under lock and key. Of course, if the objective was to intimidate Mr. Pearson, holding the letter as a sword of Damocles, rather than publicizing it, would obviously have maximum intimidative effect.

C.

Brick has no legislative immunity for his conduct.

As explained above, the government avoids discussing the Fourth Amendment or right of privacy issue in terms of the analysis suggested by Judge Wilkey. Instead, it seeks immunity for Mr. Brick in respect to his own conduct by two readings of the Speech or Debate Clause, neither of which has validity.

1. Brick, like his colleagues, cannot claim non-liability for allegedly vicarious acts.

It is argued that holding Mr. Brick liable because he violated the safe keeping order of September 14, 1967, "would be yet another form of vicarious liability," which the government claims is somehow inconsistent with the Speech or Debate Clause (Gb39). But as we pointed out above, this theory that the Speech or Debate Clause somehow prohibits vicarious liability for non-legislative acts has no foundation whatever. "The Speech or Debate Clause [does not] insulate[s] legislative functionaries carrying out ... nonlegislative directives," Doe v. McMillan, supra, 412 U.S. at 315. If Mr. Brick's pre-subpoena taking of the papers from Mr. Ratliff was, as we noted supra, a non-legislative act, then the immunity of the Speech or Debate Clause is simply not applicable to the claims which have been made against him. Additionally, since Mr. Brick had notice of the order, it was beinding upon him (Gb39, n. 27). Lastly, Mr. Brick, as in the case of the other defendants, is not alleged to have acted vicariously; rather, he is charged with being in a direct

conspiracy with Mr. Ratliff and the others.

2. The Speech or Debate Clause does not create an immunity for non-legislative acts which produce irrelevant material on the theory that ultimately relevant material might turn up.

It is argued that "liability on account of the selection and transportation of irrelevant documents is inconsistent with Doe and Servicemen's Fund" (Gb40). The flaw in this argument (as in the case of the vicarious liability argument) is that it seeks to apply to non-legislative acts principles of immunity that are properly applied only to legislative acts.

It may well be, under Servicemen's Fund, that if a subpoena is issued for irrelevant material, no liability can attach therefor. Similarly, the Congressional printing of a report, as in Doe - exactly like a speech on the floor of the House - is a legislative act and the courts are indeed barred from questioning its content. But pre-subpoena taking of a private citizen's papers is not a legislative act, hence there would simply be no immunity for that conduct even if the papers were relevant to something that a Congressional committee was investigating.

The test of immunity is not whether some fanciful theory of relevance of the documents can be conjured up; the test is whether the taking of the papers (relevant or not) was a legislative act. The irrelevance of the papers - in this case, admittedly so - is not critical to a determination that there was no legislative act. It does, however, remove any last vestige of argument on that score.

The government's argument is nonetheless helpful in making clear just how extreme is its position. We noted above that the government's contention that pre-subpoena activities constitute legislative acts means that an army of legislative employees would be authorized to operate beyond the law. The government here emphasizes how far beyond the law they may operate. They would be given carte blanche to enter any home, seize any papers, break into any file, tap any telephone, while pursuing some investigation or other "on which legislation could be had" (Gb43). Anything they do or take would be justified because, after all, "an investigator must be aware that seemingly irrelevant documents might contain clues to the location or content of other documents that would be more apparently pertinent" (Gb41). Such an argument should be enough to confirm the critical danger of extending immunity to conduct which does not constitute a legislative act in its strictest sense.

V.

THE DEFENDANTS HAVE NOT MOVED FOR SUMMARY JUDGMENT ON THE GROUND OF THE ABSENCE OF ANY GENUINE ISSUE AS TO ANY MATERIAL FACT AND, IN ANY EVENT, THE RECORD WOULD NOT SUPPORT SUCH A MOTION.

The government argues (Gb37) that Senator McClellan and defendants Adlerman and O'Donnell were entitled to summary judgment because, so it claims, the record does not have adequate sworn facts to support the McSurelys' claims of the involvement of those defendants with Mr. Brick's activities. In support of this contention the government cites Dombrowski v. Eastland, supra.

Analysis of the record here - and a comparison with that in Dombrowski - makes clear that the government's claim cannot be supported.

The original motion to dismiss or, in the alternative, for summary judgment (A.45) lists three grounds: Speech or Debate; failure to state a claim; and collateral estoppel. Each of them plainly presented a question of law. The motion for reconsideration (A.148) added the request that the court certify "the issue whether the defendants are officially immune with respect to the allegations in the Complaint."

The motion thus, while termed as being in the alternative for summary judgment, is in essence one for dismissal under Rule 12(b)(6). Since the government supported its motion by an affidavit - that of Senator McClellan - Rule 12 would bring the motion under Rule 56. Significantly, the motion by the government did not even allege

that there was no genuine issue as to any material fact.

The motion was supported by one affidavit - that of Senator McClellan. There was no affidavit by either Mr. Adlerman or Mr. O'Donnell. Thus, the record before the Court is as follows:

a) As to Senator McClellan, there are well pleaded allegations in the Complaint that he was directly involved in a conspiracy with Messrs. Ratliff and Brick which included all of Brick's actions; those allegations are supported by the McSurely affidavit (A. 54) and are not disputed by the McClellan affidavit (A. 47).

b) As to Messrs. Adlerman and O'Donnell, the same sworn allegations are made against them and they have filed no affidavits at all.

In relying on Dombrowski, the government would have the Court ignore the vast difference between the two cases in terms of the nature of the records. It asks this Court to grant a motion for summary judgment against the McSurelys as to some of the defendants because the McSurelys have not yet presented their proofs in detail - when there has been no occasion to do so.

In Dombrowski, by contrast, the motion expressly asserts (after moving for dismissal for failure to state a claim) that the defendants alternatively moved for summary judgment on the ground that seven accompanying affidavits and a deposition "show there is no genuine issue as to any material fact." 43/ In this case there is a single, quite

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43/ See "Motion to Dismiss or, in the Alternative, for Summary Judgment," Joint Appendix, Court of Appeals for the District of Columbia Circuit,
[Footnote continued on next page.]

general affidavit by Senator McClellan which does not dispute his involvement in Mr. Brick's activities and says nothing about the involvement of the defendants Adlerman and O'Donnell in those activities.

The government can hardly assert that "[r]espondents were required to show, if they could, that they would be able to prove involvement" (Gb37) when the defendants had failed to put that matter in issue by their own affidavits.

As this Court said in Poller v. Columbia Broadcasting System, 368 U.S. 464, 473 (1962):

> "We look at the record on summary judgment in the light most favorable to ... the party opposing the motion... Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"

Even in Dombrowski, where extensive affidavits were submitted, one federal defendant was kept in the case. 44/ Certainly there is no room for summary judgment upon the single affidavit here submitted.

[Footnote continued from previous page:]
Dombrowski v. Burbank, #18435, #18544 (15a). The impact of these affidavits was set forth in the government's brief in Dombrowski before this Court, #118, October Term, 1966, pp. 20-22.

44/ Mr. Sourwine, as distinguished from the Senator, was kept in the case because there was some factual issue in the record as to him. Dombrowski v. Eastland, supra, 387 U.S. at 84. No such distinction can be drawn in this case between the Senator and Messrs. Adlerman and O'Donnell since the allegations of involvement with Brick's activities are the same as to all of them.

VI.

THE COURT OF APPEALS PROPERLY RULED THAT, UPON REMAND, THE DISTRICT COURT SHOULD CONSIDER ALLEGATIONS WITH RESPECT TO THE POSSIBLE DISTRIBUTION OF McSURELY MATERIALS TO THE INTERNAL REVENUE SERVICE.

A.

On the state of the pleadings, remand was proper.

The government argues that the Court of Appeals should not have dealt with the Internal Revenue Service (IRS) claim because, so it says, "[r]espondents' complaint does not allege that private documents were disseminated to the IRS" (Gb44). But the complaint was not required to make a specific allegation as to the place to which dissemination was made.

The Complaint did allege exhibition of the documents "to persons whose names are unknown to the plaintiffs, to the damage and embarrassment of the plaintiffs" (A. 31-32). There is hardly any doubt but that with such an allegation the McSurelys at trial would be entitled to prove dissemination to the Internal Revenue Service. We do not comprehend the government's claim that "[t]his allegation does not appear to encompass dissemination by a Subcommittee within the government" (Gb44, n. 31).

The claim that the defendants are entitled to summary judgment (ibid.) because Mr. Brick in the criminal trial denied distributing the material and the same was not controverted is equally beyond comprehension. The responsive affidavit of the McSurelys expressly controverted Mr. Brick

on this point (A. 56, par. 8).

The McSurelys were prevented from taking depositions of Mr. Brick by stays which were not lifted until he had become terminally ill. They did not know at the time they filed their original affidavit what they have ascertained as a result of a Freedom of Information Act disclosure and that is indeed why they filed their supplemental affidavits. Plainly, they should be permitted to ascertain and present the facts, and that is all the Court of Appeals decided.

The government is critical of the McSurelys for not earlier having obtained the facts which the government kept secret, so that they could more specifically dispute Mr. Brick's testimony given in 1970. What is far more striking is that after the Court of Appeals permitted the filing of two supplemental affidavits of the McSurelys in 1974, which strongly indicated that there had been dissemination of documents to the IRS, the government filed no affidavit from either the IRS or the Committee disputing the same. 45/

The government claims that "the District Court had no occasion to, and therefore did not, pass on the sufficiency of a claim of dissemination or the extent of legislative immunity with respect to such a claim" (Gb44-45). Precisely because the detailed facts had not been spelled out (though a more than adequate allegation was made in the Complaint to encompass the matter), the Court of

45/ On January 24, 1975, the government filed in the Court of Appeals "Appellants' Response to Appellee's Supplemental Submission." This was a five-page memorandum of argument. No affidavits were filed.

Appeals properly remanded the matter to the District Court for determination of both factual and legal issues (Pet. App. 44a, par. 5).

B.

The government has misstated the record as to when the dissemination to the IRS commenced or is alleged to have commenced.

The government says (Gb45):

"Respondents' affidavits state that the exchange of documents between the Subcommittee and the Internal RevenueService commenced in August 1969 (A. 57-58). But it appears to be undisputed that Brick returned all of the copies of respondents' documents in the Subcommittee's possession to state officials on August 14, 1968, more than a year before the exchange of information began."

This is a plain misstatement of the record. Aside from the fact that the McSurelys did expressly dispute Mr. Brick's claim that he returned all copies of the documents on August 14, 1968 (A. 56, par. 8), the government has completely ignored the second supplemental affidavit of the McSurelys dated December 2, 1974 (A. 65).

That affidavit was filed after a second disclosure by the government. The McSurelys there explained that at the time of the submission of their first affidavit "it appeared that the relationship between those two groups [the McClellan Committee and the IRS] was generated on March 5, 1969" (A. 65, par. 4). They then explain that as a result of the second disclosure, they learned that the relationship was established in the summer of 1968 and that it appeared that there had been a

dissemination at that time. For the government under these circumstances to state that "[r]espondents state the exchange of documents" commenced in August, 1969, is a misstatement of the record.

C.

There is nothing at common law or under the Speech or Debate Clause which immunizes a legislator or legislative staff person who, having illegally acquired papers, then distributes that material.

The government seems not to perceive the impact of distribution of the material to the IRS. Firstly, it suggests that there is no violation of a right of privacy because there was no public dissemination. We pointed out above (p. 81) that the right of privacy may be invaded without a public dissemination.

Secondly, it is obvious that a search and seizure is aggravated by distribution - even non-public - and would certainly be a factor to be considered in connection with a damage claim for the search.

Doe v. McMillan, supra, effectively removes the Speech or Debate Clause as an operative, unqualified privilege in respect to distribution of materials outside the halls of Congress. And Doe dealt with distribution of materials which were public because they were in any event printed for use in Congress. Moreover, there was no suggestion that the material in Doe was illegally obtained. Certainly, in the light of Doe, there can be no Speech or Debate privilege for the distribution outside of Congress of non-public, illegally obtained papers.

Despite Doe, the government projects a theory of a Speech or Debate privilege of legislative

officials to exchange information with the executive branch of the government (Gb47). But distribution of legislative materials to executive agencies is no more a legislative act than is importuning an administrative agency on behalf of a constitutent. United States v. Johnson, supra. Such actions cannot be considered "an integral part of the deliberative and communicative process."

There is also a suggestion that, independent of the Speech or Debate Privilege, there is a general privilege for dissemination of information to law enforcement officers (Gb46). But it cannot be seriously contended that an official who effects an unlawful search and seizure is privileged to compound the effects of that conduct by having colleagues in the government share the fruits of illegality. We do not address the liability of the recipients, or the use that may be made of the material by them. Cf., United States v. Janis, supra. Our concern is solely the question of liability of the transferor and whether there is an absolute privilege with respect thereto, which would bar a trial. Even if there were some kind of privilege of legislators to communicate facts to the executive, plainly it would be a qualified privilege subject to a trial to determine a wide range of questions as to scope of authority, relevance of the transmitted material, etc. In any event, the pleadings here raised only the issue of the Speech or Debate privilege and the Court of Appeals properly remanded to the District Court the determination of all issues relating to dissemination to the IRS.

CONCLUSION

The en banc judgment of the Court of Appeals should be affirmed.

Dated:
January, 1978.

Respectfully submitted,

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FOR ARGUMENT

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No. 76-1621

In the Supreme Court of the United States

OCTOBER TERM, 1977

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v.

ALAN MCSURELY and MARGARET MCSURELY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

DANIEL M. FRIEDMAN,
Acting Solicitor General,

FRANK H. EASTERBROOK,
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1. Respondents' principal argument is that the Speech or Debate Clause provides immunity only when a Member of Congress engages in speech or voting, not when he engages in physical conduct. None of the judges of the court of appeals adopted that distinction; rather, all ten judges distinguished unconstitutional conduct (which they thought not to be covered by immunity) from merely improper conduct (which they thought the Speech or Debate Clause covers). Although we disagree with the court of appeals' conclusion, the court properly declined to embrace respondents' distinction between speech and conduct.

First, it is hard to take "conduct" out of the realm of immunity without denying to Congress the power to find information on which to base legislation. "Conduct"

could be outside the scope of the Speech or Debate Clause only if it were not an integral part of the legislative function. Yet, as this Court held in *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, investigations to discover facts are an integral part of the legislative process, and it cannot reasonably be denied that preliminary spadework is an essential part of any investigation. If investigations are protected by the Speech or Debate Clause, and if investigations—or, at least, effective investigations—necessarily involve some "conduct," then it must follow that respondents' simplistic distinction between speech and conduct is untenable.

Second, respondents' position would needlessly create the intractable problem of separating speech from conduct. Even "pure speech," such as publishing a newspaper, has a significant element of "conduct"; a newspaper may operate a printing plant employing hundreds of persons. In another context the Court held that money should be treated as speech because it is an essential precursor of speech. *Buckley* v. *Valeo*, 424 U.S. 1, 16-23. Similarly, preliminary investigation is an essential precursor of hearings and legislation. It is not worthwhile to attempt to separate "conduct" from "speech" in such situations, giving only one of them constitutional protection.

Third, respondents' position ignores *Doe* v. *McMillan*, 412 U.S. 306. The plaintiffs in *Doe* charged that Members of Congress had published private information in a committee report, and they sued, among other persons, the investigator who had secured the materials (412 U.S. at 309). This Court held that the Speech or Debate Clause shielded the act "of authorizing an investigation pursuant to which the subject materials were gathered" (*id.* at 313). The Court could have said that only the authorization—and not the actual gathering—was protected, but it did

not; it remanded the case for further proceedings with respect to the claim of dissemination alone, not with respect to any contention that the initial investigation was unprivileged. It found the investigator to be immune.

Moreover, although respondents argue (Br. 51-58) that an investigation is privileged only when conducted pursuant to a subpoena, there was no subpoena in *Doe*. That case, like this one, involved only a general legislative authorization, followed by investigation by employees of Congress. In this case, as in *Doe*, the investigation is protected by the Speech or Debate privilege.

We submit that the proper test does not distinguish speech from conduct. It requires, instead, an inquiry into whether the actions in question—whether speech or conduct—had a legislative purpose and were part of the legislative process. That is the test articulated in *Servicemen's Fund*.

2. Respondents' analysis of the difference between speech and conduct leads them to the rule that legislators and their aides may not "employ force against a citizen" (Br. 60). This is a substantially narrower standard than the speech-conduct distinction respondents employ elsewhere, and we do not disagree with that formulation of the rule. It follows from *Kilbourn* v. *Thompson*, 103 U.S. 168, and other cases that the employment of force is not part of the legislative process.

But the distinction, if put in this way, does not assist respondents. What happened here involved no force, and it is much more closely associated with speech than with forceful conduct. Judge Leventhal's opinion found potentially actionable behavior in the following events: (i) Brick *read* papers willingly supplied or made available to him by Ratliff, who was in possession of the papers

pursuant to court order; (ii) Brick took the written materials to Congress, where Senator McClellan *read* some of them and allegedly gave or *talked* about them to other persons; (iii) Ratliff did not *ask* the three-judge court for formal permission to show the papers and give copies of some to Brick, apparently believing (perhaps mistakenly) that he did not need to seek formal permission.

There were no arrests, no entries onto private property, no removal of original papers; nothing was done without the consent and cooperation of the custodian of the papers. The obtaining of the papers was no more forceful here than it was in *Doe*, and no more stealthy. Brick's behavior involved no more "conduct" than the issuance and service of the subpoena in *Servicemen's Fund*. If, as respondents argue, there is a continuum between privileged speech and unprivileged force, the facts of this case place it at or close to the speech end of that continuum.

3. Respondents emphasize the distinction between activities directly related to (or part of) the legislative process, which are privileged under the Speech or Debate Clause, and activities only peripherally related to legislation, which are not. This distinction, too, does not assist respondents. All ten judges of the court of appeals concluded that the investigation in which Brick was engaged was part of a legitimate legislative inquiry by the Subcommittee into matters about which legislation could be had (Pet. App. 17a-18a, 55a n. 3). Congress itself ratified that view when it cited respondents for contempt of Congress; the citation necessarily recognized that the Subcommittee was engaged in a proper inquiry and that respondents' refusal to comply with the subpoena—which called for production of many of the original documents

of which Brick had obtained copies—frustrated that inquiry. Brick's neglect to separate relevant from irrelevant documents among those Ratliff gave him was, at most, negligence in the execution of a legitimate legislative function.

Much of respondents' presentation relies on their belief that Senator McClellan and other persons desired to obtain information for illegitimate purposes, including blackmailing Drew Pearson (*e.g.*, Br. 10-20, 64-68). This is simply second-guessing the conclusion of Congress itself that the Subcommittee was engaged in a legitimate investigation. The more serious objection to respondents' argument, however, is that it requires an inquiry into the motives of a Senator and his staff in conducting an investigation that Congress authorized.

Nothing is better settled than that an excursion into motives is prohibited by the Speech or Debate Clause. "If the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it." *Servicemen's Fund, supra*, 421 U.S. at 508-509; see also *United States* v. *Johnson*, 383 U.S. 169, 180, 183; *Tenney* v. *Brandhove*, 341 U.S. 367, 377-378. Because of this inhibition, designed to secure the independence of Congress from judicial inquiry into claims of bad motive that are easy to make but difficult to refute, the propriety of legislative acts must be assessed objectively. Assessed objectively, Brick's conduct was part of a valid legislative inquiry.

But, respondents contend (Br. 51), "gathering information for a hearing" is not legislative at all. Respondents cite *Gravel* v. *United States*, 408 U.S. 606, 620, for this proposition. The passage of *Gravel* to which

respondents refer dealt with *Dombrowski* v. *Eastland*, 387 U.S. 82, in which the Court held that the Speech or Debate Clause did not pertain to involvement in an unconstitutional search by state officials. *Dombrowski* itself held that the Speech or Debate Clause created absolute immunity from liability for "taking over" the illegally seized documents for use by Congress, and therefore *Dombrowski* necessarily holds that gathering of information for use by Congress is part of the legislative process. To the extent the passage of *Gravel* to which respondents refer had some broader meaning, it was *dicta* that did not survive *Servicemen's Fund*.

4. Respondents assert (Br. 96-97) that we have misstated the record in arguing that no documents could have been disseminated to the Internal Revenue Service before all of the copies of respondents' papers were returned. But the record shows both that the copies of the papers taken by Brick were returned to state officials on August 14, 1968 (see Pet. App. 8a n. 13, 9a n. 15, 14a n. 25, 31a n. 59; A. 98),[1] and that the first exchange of documents between the Subcommittee and the Internal Revenue Service did not occur until August 1969 (A. 57-63). Respondents say that we have overlooked their contention (A. 65) that the "relationship between" the Subcommittee and the Internal Revenue Service was "generated" on March 5, 1969, but this contention is

[1]Respondents state (A. 12, 33, 67) that the originals and copies were returned to them on November 8, 1968. This is, however, quite consistent with our statement that the Subcommittee surrendered the copies to state officials on August 14, 1968. Respondents have not offered any evidence that would show that the Subcommittee had possession of the copies after August 14, and the general unsubstantiated denial (A. 56) is inadequate to create a disputed issue requiring a trial. Moreover, November 8, 1968, still is well before the date on which the Subcommittee and the Internal Revenue Service began to exchange documents.

irrelevant because respondents concede that they *received* the original documents and the copies taken by Brick on November 8, 1968 (A. 12, 33, 67). Even if an exchange of information took place as early as March 1969, it could not have included any of respondents' materials.

The earliest dates for any sort of discussions between the Subcommittee's staff and the Internal Revenue Service are August 28, 1968, and two dates in September 1968 (A. 66). These discussions began after the Subcommittee had surrendered its copies of respondents' papers. Moreover, the documents submitted by respondents themselves show that the preliminary discussions among staff did not culminate in exchanges of materials until 1969 (A. 59-63, 73-75).

The final difficulty with respondents' position is that nothing in the record tends to show that the copies of their documents were in fact disseminated to anyone outside the Subcommittee. Brick denied under oath that there had been dissemination (A. 97-98), and although respondents speculate that Brick might have been lying, they offer no support for that speculation. Respondents do not, for example, state that any person will testify that he saw copies of their papers; they do not state that they have been told by any person that he or she saw copies (or even heard of anyone who said that he did).

In other words, respondents want to engage in a fishing expedition. The Speech or Debate Clause was designed to prevent subjecting Members of Congress and their aides to discovery that has no other purpose than to explore in the hope that something might turn up; it is too late for respondents to explore their case in search of its existence. As Judge Leventhal concluded when dealing with another claim of dissemination, "[w]hen the court is confronted with something as unusual as an attempt to

sue Congressmen for participating in a 'public' distribution, the least plaintiffs must supply, before pressing any claim to discovery, is a concrete factual indication that there was indeed a 'public' distribution." *Doe* v. *McMillan*, C.A. D.C., No. 75-2016, decided July 29, 1977, rehearing denied, October 13, 1977, slip op. 3-4 (concurring opinion), petition for a writ of certiorari pending, No. 77-1027.

Respondents have not supplied any "concrete factual indication" that there was a distribution, and the evidence in the record makes it unlikely, if not impossible, that a distribution took place. It is time for this case, now in its second decade, to come to an end. Petitioners are entitled to summary judgment.

For these reasons, as well as those discussed in our opening brief, the judgment of the court of appeals should be reversed in part.

Respectfully submitted.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

FRANK H. EASTERBROOK,
Deputy Solicitor General.

FEBRUARY 1978.

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*The Solicitor General is disqualified in this case.

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